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IN THE

# Supreme Court of the United States

**October Term, 1941**

No. 806

PAUL E. MANHEIM, as a Committee, and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee,
*Petitioners,*

*against*

VAN S. MERLE-SMITH, *et al.*, J. P. MORGAN, *et al.* and J. HERBERT CASE, *et al.*, Contracting Committees, The City of New York, the Transit Commission and all other parties to Plan and Agreement to end the receivership of Interborough and Manhattan Companies, Thomas E. Murray, as Interborough Receiver, and William Roberts, Receiver of Manhattan Railway Company,
*Respondents.*

## Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit (Including Brief in Support Thereof)

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*Respondents.*

## Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit (Including Brief in Support Thereof)

Paul E. Manheim as an owner of and as attorney-in-fact for other owners of Manhattan Railway Company 4% Second Mortgage Bonds in the aggregate principal amount of $484,000, prays for a writ of certiorari to review the order (R. 968) of the United States Circuit Court of Appeals for the Second Circuit, entered on September 23, 1941, pursuant to the decision of that Court (SWAN, AUGUSTUS N. HAND and CLARK, JJ.) affirming without costs various orders and decrees (R. 187-272, 287-9, 318, 410-9, 455-561, 566-575) of the United States District Court for the Southern District of New York made herein on December 11, 1939 and on March 4, March 15, June 10,

June 12, and October 30, 1940. The Chase National Bank of the City of New York, as Trustee for the Manhattan 4% Second Mortgage Bonds, joins in this petition to the extent indicated at the end hereof.

## Opinions Below.

The opinion of the District Court for the Southern District of New York (R. 400-409) is unreported. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 951-62) is reported in 122 F. (2d) 454.

## Jurisdiction.

The jurisdiction to issue the writ requested is found in the provisions of Sec. 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, Sec. 1, 43 Stat. 938; 28 U. S. C. A. Sec. 347(a)). This Court has already passed on the jurisdiction of the District Court over the receivership out of which this case arose in *Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479, at page 487.

## Statutes Involved.

No statute is involved here but there is involved a construction of paragraphs "(a)" and "(c)" of Rule 23 of the Federal Rules of Civil Procedure.

## The Questions Presented.

This controversy arises out of the treatment of non-assenting Manhattan 4% Second Mortgage Bonds under the consummation of the Unification Plan pursuant to which two jointly operated transit companies in Federal equity receivership, Manhattan Railway Company (hereinafter called "Manhattan") and Interborough Rapid Transit Company (hereinafter called "Interborough"), were liquidated and the City of New York acquired their prop-

erties for City operation. The Plan provided that the City would pay for the properties of both companies a single price of $164,000,000, consisting of about $20,000,000 in cash and $144,000,000, in principal amount of New York City 3% Corporate Stock* of a type then selling around par. Security holders of each company who assented to the Plan agreed to take for their securities the Plan prices, that is payments out of the $164,000,000 made largely in Corporate Stock, in amounts specified in the Plan and fixed as a result of negotiations between groups of security holders. Security holders who did not assent to the Plan within three months of its consummation (R. 94-9), such as the petitioner and those he represents, were to receive "the cash distributive share to which all holders of securities shall be legally entitled" (R. 102), the amounts of which were not fixed in the Plan. The cash distributive share of non-assenting Manhattan Second Mortgage Bonds has been fixed at $394.68 per Bond (R. 566-9) by means of a foreclosure sale designed to show that this issue had no rights in the Manhattan physical assets and a class action supposed to fix its rights in the remaining assets, the claims of Manhattan parties against Interborough. The general question presented is whether the legal cash distributive share of non-assenting owners of Manhattan Second Mortgage Bonds has been properly fixed at $394.68 per Bond.

The problem before the courts in determining the petitioner's legal cash distributive share would appear to have been one of valuing the municipal bonds forming part of the $164,000,000 fund and thereafter determining rights in that fund. This has never been done, but, instead, the reorganization technique of fixing all legal cash distributive shares so low that all will assent has been misapplied here to a liquidation proceeding. Where it is necessary to coerce people into taking securities in a reorganized

* Corporate Stock is one form of New York City bonds. For prices at which it has sold, see page 11 hereof.

enterprise, in lieu of cash, in order to retain enough cash to run the enterprise, this reorganization technique may be justified on the ground of necessity; but on the liquidation of a corporation by the sale of its assets to an outside purchaser, the purchaser alone has the responsibility of obtaining the cash to run the enterprise and the reorganization technique of coercive judicial sales has no place, be the purchase price paid in cash, coal or municipal bonds.

The petitioner has ventured the foregoing remarks because his petition loses much of its point should the Court fail to realize at the outset that this case involves a liquidation, not a reorganization.

More specifically, the questions presented are:

I. Whether any compromise of a class action brought to determine the legal cash distributive share of non-assenting holders of Manhattan 4% Second Mortgage Bonds (and only of non-assenting holders of this issue) on the liquidation of their corporation, should have been approved by the District Court under Rule 23(c) of the Federal Rules of Civil Procedure, when the compromise was not agreed to by any non-assenting Manhattan Second Mortgage Bondholder or by any representative of such a Bondholder and was opposed by the petitioner.

II. Whether a compromise of a class action should have been approved by the District Court under Rule 23(c) which fixes at $394.68 per Bond the legal cash distributive share of non-assenting holders of Manhattan 4% Second Mortgage Bonds (in the principal amount of $1,000 each and on which no interest has been paid since December 1, 1933, R. 154) on the liquidation of their corporation, on the apparent basis of determinations:

(a) that the properties of both companies bought by the City for cash and municipal bonds worth about

$164,000,000 were sold on the same day by the companies for but $97,000,000 in cash;

(b) that the legal cash distributive shares of all Manhattan security holders in the $97,000,000 totaled but $41,000,000, although the Interborough parties, none of whom appealed, permitted the Manhattan parties to take some $51,000,000 ($16,500,000 in cash and $34,500,000 in that principal amount of municipal bonds worth about par) out of the $164,000,000; and

(c) that the Manhattan stockholders were entitled to over $9,500,000 out of the $41,000,000* as a result of their disputed and undecided contention that they had a direct claim as creditors of Interborough for an undetermined amount.

III. Whether a compromise of a class action should have been approved by the District Court under Rule 23(c) which fixes at $394.68 per Bond the legal cash distributive share of non-assenting Manhattan 4% Second Mortgage Bonds on the liquidation of their corporation, where the $394.68 was actually fixed by taking 80% of the $500 Plan price (R. 888-91), a price determined in negotiations in which the only representatives of any Manhattan Second Mortgage Bonds indicated that they did not represent the issue as a whole (R. 316, 581, 593, 91, 146).

IV. Whether, if the $394.68 per Bond has not been properly fixed, the Manhattan Second Mortgage Bondholders are entitled on this Record to be paid in full or to the Plan price of $500 in Corporate Stock or to a new trial.

No question is presented (a) which might require the City to return the transit properties to the companies or

*$41,000,000 would have been enough to pay principal and interest in full to all non-assenting Manhattan bondholders of both issues and to pay the assenting Manhattan bondholders of both issues the Plan prices which they had agreed to take by assenting (see table at page 12 hereof and R. 403, 409).

affect those security holders who assented to the Plan, or (b) as to the right of Manhattan to sell its properties to the City, together with the properties of Interborough, for a single sum payable partly in municipal bonds, or (c) as to the amount of the purchase price.

## Statement.

### (a) Relationship between Manhattan and Interborough

In 1903 Manhattan leased all its then existing properties for 999 years to Interborough, and Interborough operated these properties (elevated railroads and a power plant) since that time until their recent acquisition by the City of New York for operation by it. Under the Lease (Exhibit 4, Vol. III) Interborough agreed, among other things, to pay Manhattan, as rent, taxes on Manhattan properties, interest on bonds outstanding and to be issued, and $7 a share per annum for each of the 600,000 shares of Manhattan stock of the par value of $100 per share then outstanding or shortly to be issued. The Lease gave Interborough the privilege of paying directly to the Manhattan stockholders their annual payment after Manhattan had declared a dividend (see Exhibit A annexed hereto). Interborough endorsed on the Manhattan stock certificates a guaranty to pay in accordance with the Lease. The Lease made no provision for paying principal on Manhattan bonds then outstanding in the principal amount of almost $40,000,000 (Exhibit 4, p. 12). In 1922, most of the Manhattan stockholders agreed to a reduction in the annual payment to them to $5 per share per annum, payable only if earned by Manhattan or Interborough (R. 154, 809-11, Exhibit 14, Vol. IV).

### (b) The Securities Owned or Represented by the Petitioner

Manhattan had outstanding on the date of consummation of the Plan of Unification, an issue of Consolidated Mortgage Bonds in the principal amount of $40,670,000 ahead of the Second Mortgage Bonds (R. 154). The petitioner and

those he represents as attorney-in-fact own $484,000 in principal amount of the Second Mortgage Bonds (R. 897, 954) or over 10% of an issue of but $4,523,000 in principal amount (R. 154).

**(c) The Plan of Unification and the Price Paid by the City**

Both Manhattan and Interborough have been in receivership since 1932. The Plan of Unification was the means of terminating the receivership by selling the properties of both companies to the City of New York for operation by it. The Plan refers to the Committees representing the first mortgage issues of each company as the "Contracting Committees".

"The Plan provided that on conveyance of the properties to the City it would pay over to the Contracting Committees some $151,000,000 of its Corporate Stock and would recognize certain cash adjustments which would bring the total price to about $164,000,000",* said the Circuit Court of Appeals in its opinion (R. 957, see also Plan provisions, R. 91, 94, 96-7, 104-5). Under the Plan, the entire $164,000,000 was available for distribution to the security holders of the two companies (subject to deduction for payments to their agents and attorneys, R. 98-9) as the City agreed to pay all claims made and taxes assessed against the two companies other than the claims of security holders (R. 118-125).

It is also, perhaps, worth emphasizing that the City bought the properties, not the Manhattan and Interborough securities, for the reason that our opponents have asserted below that the City was buying securities. This assertion is belied by the terms of the Plan (R. 85-8, 91) and the manner in which it was consummated (R. 45-6, 456-556). If further proof of the inaccuracy of such assertion be necessary, we respectfully refer the Court to the provi-

* Actually, the City paid about $20,000,000 in cash pursuant to its option and $144,000,000 in Corporate Stock (R. 462, 523, 560).

sions of the Plan giving the City options, never exercised, to buy the securities (R. 140-1).

**(d) Treatment of Assenters to the Plan**

The Contracting Committees were directed by the Plan to make offers at prices fixed by the Plan to all the security holders of each company, which offers, if accepted by all, would have exactly eaten up the $164,000,000.

$500 per Bond was the Plan price for Manhattan Second Mortgage Bonds against a total claim for principal and interest of $1,261.22 per Bond on the date of the consummation of the Plan, and the offers to that issue at the Plan price aggregated $2,261,500 (R. 154). The offers at the Plan price made to the holders of the $40,670,000 in principal amount of Manhattan Consolidated Mortgage 4% Bonds aggregated $36,551,663.39, paid to the extent of $19,902,750 in New York City 3% Corporate Stock, and amounted to approximately $900 per Bond against a total claim for principal and interest on the date of consummation of the Plan of about $1,100 (R. 46, 154, 462, 104-5). The aggregate of the offers at the Plan price made to the holders of the 600,000 shares of Manhattan stock was $12,096,160 in the form of Corporate Stock (R. 154). Thus the aggregate of the offers to assenting Manhattan security holders totalled $50,909,323.39, a sum more than the $50,760,000 necessary to pay all the Manhattan bonds in full with accrued interest to the date of consummation of the Plan (R. 154). The rest of the $164,000,000 was divided among the Interborough security holders.

These Plan prices for assenters were fixed for the most part by negotiations between committees representing various issues of securities (R. 579-82). The $500 price for Manhattan Second Mortgage Bonds was, however, fixed by negotiations between Mr. Cuthell, Special Counsel for the Transit Commission, and the Rockefeller interests, who owned over 60% of the issue when the Plan was signed (R. 316, 581, 593). Throughout the proceedings, the

Rockefellers steadfastly contended, through their representative, Curtiss, Belknap & Webb, that they did not represent the entire issue (R. 316, 593, 91, 146, 454), presumably because of their large ownership of other issues whose interests conflicted with those of the Manhattan Second Mortgage Bonds.

**(e) Provisions for Non-Assenters to the Plan**

The Plan did not purport to force security holders to accept the offers available for assenters. Instead, it provided that non-assenters would receive "the cash distributive shares to which all holders of securities shall be legally entitled" (R. 102). The amounts of these legal cash distributive shares were to be fixed by judicial sales and the Settlement Fund hereinafter described. Cash for non-assenters was to be provided by the City's buying back the Corporate Stock not taken down by assenters, at par if necessary (R. 102).

**(f) Analysis of Plan**

Reduced to its simplest terms, the Plan was one of liquidation involving a purchase by the City for $164,000,000 in cash and Corporate Stock of all the assets of Manhattan and Interborough in order that the City might operate the elevated and subway trains. With these proceeds, the two companies, through the agency of the Contracting Committees, were to offer to buy in their own securities for cancellation at specified prices. Those security holders who did not accept the offers were to receive their legal cash distributive shares. Where the cash was to come from if the sum of the legal cash distributive shares of non-assenters exceeded the cash and par value of the Corporate Stock available for them had they assented, does not appear in the Plan.

**(g) Action of the District Court**

By an order dated March 15, 1940, the District Court approved as fair the Plan prices offered assenters to the Plan (R. 419).

The Plan prices were all compromises of the maximum claims of each security to the $164,000,000 fund (R. 153-5). Had all security holders been forced to accept these Plan prices, the District Court would have had to pass on them; but since the only persons affected by the District Court's approval of the Plan prices were those who voluntarily accepted them, it does not seem to us that it had to pass on these prices at all any more than it would have had to pass on the fairness of any other compromise assented to by all persons affected.

The District Court's desire to pass on the Plan prices seems to have arisen from applying the technique applicable in reorganizations to a liquidation. When a court permits reorganization to take place in lieu of liquidation, it assumes that it is either advantageous or necessary for the same security holders to continue to operate the enterprise, and no real liquidation sale to an outsider is made. The proceeding which fixes the legal rights, the judicial sale, is likely to be of little value to any security holder since the upset prices fixed are based on a guess as to what liquidation might have realized, and, in practice, the guess is often influenced by lack of cash sufficient to make large cash payments to dissenting security holders and still continue to run the enterprise properly. The real opportunity for the security holders is furnished by the provisions made for them under the plan of reorganization, and hence the fairness of such provisions is of paramount importance.

But the Plan of Unification is a plan of liquidation. On the sale of the assets of Manhattan, each security holder was entitled to receive his legal share of the proceeds of the liquidation sale and this the Plan purports to assure him if he does not assent to it (R. 102). That he is also offered a chance to assent to the Plan and sell his securities for a compromise price need concern the courts no more than the price at which his securities might be selling

on the market, and certainly should not, in theory, affect the size of his legal cash distributive share in the proceeds of the liquidation sale.

It is earnestly contended that *Consolidated Rock Products Co.* v. *Du Bois,* 312 U. S. 510, and *First Nat. Bank* v. *Flershem,* 290 U. S. 504, required the determination of the legal rights of non-assenters by means of allocating, with the aid of independent appraisers, part of the $164,000,000 purchase price to the Manhattan properties, the remainder to the Interborough properties, and thereafter determining the amount and ownership as between Manhattan and its stockholders of the admittedly enormous claims against Interborough in favor of Manhattan parties arising out of the 1903 Lease. If not valued at par, the $144,000,000 of Corporate Stock contained in the $164,000,000 purchase price should certainly have been valued at some figure no lower than the lowest sales price paid in 1940 for it or any comparable New York City issue, which price was 88⅛* on a "when issued" basis.

So much for theory. In practice, the District Court did approve all the Plan prices on March 15, 1940 (R. 419). In practice, this approval was not based on any allocation of the $164,000,000 purchase price to the respective properties of the two companies with the aid of independent appraisers or on any other fundamental determinations with respect to rights under the Manhattan Lease. In practice, this approval of the Plan prices has determined the legal cash distributive share of each issue of Manhattan securities because these shares were actually fixed by taking 80% of their Plan prices (R. 888-91).

The procedure pursuant to which the legal cash distributive shares of various classes of non-assenters was fixed

* This low figure was the result of the issuance by the City of New York of almost $300,000,000 in principal amount of 3% Corporate Stock in June of 1940 at a time when France was being overrun. The 1941 range is 100 - 111⅝; the 1940 range 88⅛ - 104⅛.

was not even intended to determine their legal shares in the $164,000,000 some of which would necessarily have been greater and others smaller than the assenters' shares in the same fund. In the words of the Circuit Court of Appeals: "It may be conceded that the procedure adopted was intended to make assent to the Plan more attractive than dissent" (R. 957). How well it succeeded can be seen by reference to the following table:

| Issue | Assenter's* Plan Price Per Unit | Non-Assenter's Cash Distributive Share Per Unit | Total* Payable to Issue if all Holders Assented (Sum of Plan Prices) | Total Payable to Issue if No Holders Assented (Sum of Distributive Shares) |
|---|---|---|---|---|
| Man. Con. Mortg. 4% Bonds, $1,000 Principal Amount | $898.74 | $729.44 | $ 36,551,663.39 | $29,666,666.67 |
| Second Mortg. 4% Bonds $1,000 Principal Amount | 500.00 | 394.68 | 2,261,500.00 | 1,785,133.73 |
| Man. Guaranteed 7% Stock | 35.00 | 27.63 | 1,522,850.00 | 1,202,073.40 |
| Man. Modified Guaranteed 5% Stock | 19.00 | 15.00 | 10,573,310.00 | 8,346,126.20 |
| | | | $ 50,909,323.39 | $41,000,000.00 |
| Int. First Mortg. Bonds $1,000 Principal Amount | $848.74 | $372.29 | $ 82,493,063.47 | |
| Int. Secured** 7% Notes, $875.99 Principal Amount | 816.17 | 595.97 | 25,849,878.63 | $56,000,000.00† |
| Int. Unsecured 6% Notes, $1,000 Principal Amount | 350.00 | 81.77 | 3,675,000.00 | |
| Int. Stock | 3.00 | 0.00 | 1,050,000.00 | 0.00 |
| | | | $163,977,265.49 | $97,000,000.00 |

* Payable entirely or almost entirely in City Corporate Stock except for the Manhattan Consolidated Mortgage 4% Bond Issue which was payable 45% in cash, 55% in Corporate Stock (R. 485-99).

** Each Note was secured by about $1,736.00 in principal amount of Interborough First Mortgage Bonds.

† $6,000,000 represented the proceeds of unmortgaged property.

1. The Foreclosure Sales

The first step in fixing the legal cash distributive shares of non-assenters was to sell at foreclosure on January 25, 1940 the Manhattan physical properties (but not $6,000,000 in cash and the claims on the Lease against Interborough, R. 240) for $17,000,000 to the Merle-Smith Committee representing the assenting Manhattan Consolidated Mortgage Bonds (R. 678). Then the Interborough properties were sold at a judicial sale to the Morgan Committee representing the assenting Interborough bonds for $56,000,000, subject to the claims of the Manhattan parties on the Lease (R. 894, 747-8, Exhibit 52, Vol. VII, pp. 33-35). It was later determined in a class action known as the Settlement Fund proceeding, that the Manhattan parties were owed $18,000,000 by the Interborough, and Manhattan non-assenters were permitted to share in this $18,000,000. Thus the funds on the basis of which non-assenters are now being paid total $97,000,000.

The Manhattan properties were sold at an upset price fixed by the District Court on the basis of testimony given that very day by a single expert called by the committee representing assenting Manhattan Consolidated Mortgage bondholders (R. 675, 647, 187, 219). The expert did not consider the $164,000,000 amount paid by the City for the properties of the two companies or the value of the Interborough properties (R. 647-75). To be sure that the assenters would not be injured by the sale, the foreclosure decree contained provisions permitting the District Court to void the sales in the event that the Plan was not approved (R. 217-8).

On June 12, 1940, the purchasing committees acquired title to the properties of the two companies (R. 241-304) and on the same day they conveyed them to the City of New York (R. 524-556) in return for its promise to pay some $14,000,000 in cash and $144,000,000 in Corporate Stock (R. 527, 539, 560, 91, 94, 96-97, 104-5), some $6,000,000

in cash being paid by the Manhattan Consolidated Mortgage Trustee directly to holders of Manhattan Consolidated Mortgage Bonds (R. 96-7). The effect of these transactions has been to solemnly adjudge that, although the City has always been willing to pay about $164,000,000 for all the properties, the legal rights of the security holders in the proceeds of the properties totaled only $97,000,000 or that the $144,000,000 of Corporate Stock was worth only 51, 37 points less than the lowest price at which this issue of municipal bonds has ever sold.

Of course, the foregoing does not by itself prove that the Manhattan foreclosure price was too small a portion of the $164,000,000 paid by the City, but the rest of the Record does. To mention a few salient points, the assessed value of the Manhattan railways and the power plant alone at the time of foreclosure was $42,600,000 (R. 878), a fact which the Manhattan expert did not have before him (R. 878). It is true that the earnings of the Manhattan railways were bad, but the City wanted them to tear them down, not to operate them for any length of time, and in fact tore down roughly half of them in 1940. The only other method of acquiring the lines open to the City was by condemnation and in condemnation proceedings, the City would have had to pay at least the assessed value fixed by the City itself. The Sixth Avenue line alone was condemned in 1938 for $12,500,000 (R. 590) and the trackage transferred to the City in 1940 was about five times that of the Sixth Avenue line. The Manhattan rolling stock and power plant was valued at from $8,000,000 to $10,000,000 by the assenters' own expert (R. 654, 772).

On the other hand, the experts used on the Interborough foreclosure testified that the upset price should be $40,000,000 for the Interborough mortgaged properties (subject to claims later compromised for $18,000,000) and $6,000,000 for the Interborough unmortgaged properties (R. 722, 740). After hearing argument of counsel, the

District Court raised the upset price on the foreclosed assets to $50,000,000 (R. 748). Nothing in the Record, then, indicates that many of the missing millions should be allocated to the Interborough properties.

2. The Settlement Fund

Throughout the proceedings, the holders of all of, Manhattan 600,000 outstanding shares claimed that they had obtained in 1903 a direct assignment to themselves of rent payable by Interborough under the Lease of all the Manhattan assets, to the extent of $7 a year per share. The holders of the 556,490 shares whose owners accepted the Modified Guaranteed status in 1922 limiting them to payments of $5 a year payable only if earned by either Manhattan or Interborough thereafter, further contended that they had been restored to a position where they had a claim of some $57 a share as creditors of Interborough, by reason of the failure of Interborough to pay a disputed claim of $5.50 a share for dividend rental asserted to have been earned in 1928, 1929 and 1930 (R. 809-824, 840-6).

It is impossible to discuss adequately, within the bounds of this petition, the merits of the contention of any class of Manhattan stockholders that they were direct creditors of Interborough. Suffice it to say here that the language of the Lease (Exhibit A, attached hereto) requires Manhattan to declare dividends before its stockholders are to receive the $7 annual payment and that it merely gives Interborough the privilege of paying the stockholders of Manhattan directly, the "dividend rental" being payable to Manhattan. Perhaps it is worthwhile to point out that Manhattan had outstanding in 1903 $40,000,000 in bonds (Exhibit 4, Vol. III, p. 12) and provided in the Lease itself for the subsequent issuance of the Manhattan Second Mortgage Bonds (Exhibit 4, pp. 8, 12), and that the Lease made no provision for paying principal on any bonds (Exhibit 4, p. 13). Since the Manhattan stock was $100 par

value stock (Exhibit 4, pp. 4-5), the assignment of rent to the stockholders would have been an illegal dividend or distribution to stockholders, impairing capital under New York law (§ 23, Chap. 354, N. Y. Laws of 1901). Thus it would appear that any claims for rent, including the "dividend rentals", belonged to Manhattan Company and through it to its creditors.

Since the above described controversy existed as to what part of the claims for rent belonged to the Manhattan Company and were, as a result, subject to the Manhattan Consolidated Mortgage, none of these claims were sold at the Manhattan judicial sales (R. 240). Thus, even after the sale of the Manhattan physical assets for $17,000,000, the Manhattan non-assenters had these claims on which to realize. In fact, the Manhattan non-assenters were the sole parties interested as plaintiffs in a determination of the value and ownership of these claims as all Manhattan assenters, by assenting, specifically agreed to sell their securities at the Plan prices and to give up their right to share in the proceeds of these claims (R. 103-4, 114). Besides the assenters and their committees had an adverse interest to that of the non-assenters since, if there should not be enough of the $164,000,000 left after the distribution to assenters to take care of non-assenters, those assenters who received too much and those responsible for the excessive distribution would undoubtedly be liable to non-assenters. Until June of 1940, the City had not agreed to assume any such liability (R. 102, 528-9, 532-4, 549, 553-4).

Despite the adverse interests of the assenters, the committee representing assenting Manhattan Consolidated Mortgages brought*, on behalf of all Manhattan non-

* The Circuit Court of Appeals stated (R. 956) that the Trustee for the Manhattan Second Mortgage Bonds had started the suit but all it did was to file a proof of claim against the Interborough in 1938 before the Plan was formulated, which proof of claim was adopted by the committees representing assenters as one of their pleadings (R. 344-5, 354).

assenters, class actions to have all matters in connection with the claims on the Manhattan Lease determined (R. 335-57). A few days later, the assenters, pretending to represent the non-assenters under Rule 23 of the Federal Rules of Civil Procedure, compromised the class actions by the Settlement Fund Order, an order entered on March 15, 1940, the same day that the Plan prices were approved (R. 410-9). The Settlement Fund Order raised the amount of the $13,500,000 Fund originally proposed (R. 396-9)) to $18,000,000 as a result of oral argument (R. 888-91). If one adds $18,000,000 to the $6,000,000 in cash in the hands of the Manhattan Consolidated Mortgage Trustee (R. 673-4) and the $17,000,000 Manhattan foreclosure price, one gets $41,000,000, not the fund of the value of approximately $51,000,000 which the Interborough parties were willing to let the Manhattan parties have (R. 154) and the City was originally willing to pay to Manhattan assenters and non-assenters combined (R. 102).

But even $41,000,000 would have been sufficient to pay on March 15, 1940, all non-assenting Manhattan bondholders in full and all assenting Manhattan bondholders their Plan price (see table at page 12 herein, third column, and R. 403). To make certain that no non-assenting Manhattan bondholder would receive more than he would by assenting, the Manhattan non-assenters were not allowed to fight over the allocation of the $18,000,000. Instead the Settlement Fund was arbitrarily allocated by the Settlement Fund Order so that each Manhattan non-assenter would receive approximately 80% of what he would get by assenting, the non-assenting Manhattan Second Mortgage Bonds receiving $394.68 and the non-assenting Manhattan stockholders over $9,500,000 or an average of $16 a share (R. 888-91). Not a single non-assenting Manhattan security holder, any representative of his, any receiver or mortgage trustee agreed to compromise all the claims at $18,000,000 or to allocate the $18,000,000 on the 80% basis. That no Manhattan non-assenter would agree to such a compromise would seem to be obvious since a better com-

promise was available from March 15, 1940 to September 26, 1940 by assenting to the Plan (R. 564-5). The assenters took care to prevent the Settlement Fund Order from affecting them by providing therein that if the Plan was not consummated, the compromise provided for would be null and void (R. 418).

This compromise is justified by the proponents of the Plan because representatives of the petitioner were in Court, objecting to the compromise. Even assuming that the compromise was a fair one, it would seem that a class of plaintiffs, just like an individual plaintiff, should have a right to refuse any compromise in favor of taking its chances on the outcome of the litigation.

Nor is there any indication that the compromise of $394.68 per Bond was fair. Although there was considerable evidence before the District Court, no possible relationship between this evidence and the result achieved has ever been shown. The correctness of the contention that any of the Manhattan stockholders were entitled to be paid as creditors of Interborough was never decided (R. 400-9, 960), and there is no discussion anywhere as to the means by which the Modified Guaranteed Stock expanded a possible claim of $5.50 a share into a payment of $15.00 a share (R. 564). Even assuming the basic contention of the Manhattan stockholders to be correct, until it is also decided how much of the $18,000,000 was paid on account of Interborough's failure to pay, as rent under the 1903 Lease, interest on Manhattan bonds, $9,000,000 in taxes payable by Interborough under the Lease but paid by the Manhattan Consolidated Mortgage Trustee (R. 204-5, Exhibit 4, pp. 15-6), the "dividend rental" of the Guaranteed Stock and the "dividend rental" of the Modified Guaranteed Stock, respectively, and until it is determined how much of the $164,000,000 paid by the City for the properties of the two companies should be attributed to the purchase of Manhattan properties, there is no criterion for determining the fairness of the allocation of the $18,000,000.

All in all, this case is as much like *Consolidated Rock Products Co.* v. *Du Bois,* 312 U. S. 510, as a liquidation can be. The temptation to come to an arbitrary result because the situation was complicated was not resisted by the District Court in either case. This is especially unfortunate for the Manhattan Second Mortgage Bonds since the issue is so small that a very little change in the valuations or allocations makes a great change in the amount to which they are entitled, and a decision in their favor on any one of a number of undecided issues would entitle them to payment in full.

**(h) Opinion of the District Court**

The opinion of the District Court has nothing to say with respect to the legal rights of the non-assenters, merely concluding that the Plan seemed fair for assenters (R. 405-6). If it was, it was difficult to see how the compromise at a 25% discount forced on Manhattan non-assenters was also fair, to say nothing of the treatment accorded to Interborough non-assenters (see table at page 12 hereof).

**(i) Proceedings in the Circuit Court of Appeals**

Appeals were taken to the Circuit Court of Appeals from virtually all the orders and decrees in the District Court in order to avoid procedural difficulties. Argument was had in the Circuit Court on May 22, 1941.

**(j) Opinion of the Circuit Court of Appeals**

The opinion of the Circuit Court of Appeals said that no doubt was cast upon the $97,000,000 basis on which the legal cash distributive shares of non-assenters was fixed because the $164,000,000 price paid by the City was paid partly in Corporate Stock (R. 957-8). It did not discuss the value of the Corporate Stock. It cites as support certain reorganization cases (R. 958) in the lower Federal courts (all decided before this Court's decision in *First Nat. Bank* v. *Flershem,* 290 U. S. 504) which upheld low

upset prices as a necessary device to keep the old security holders in control of the reorganized enterprises. It is respectfully suggested that the old security holders here do not now control the City of New York because of their ownership of New York City Corporate Stock, and through it the transit facilities.

We reiterate that this case involves a liquidation. Hence no question arises as to keeping the old security holders in control of the enterprise as they are all abandoning it. Hence there is no need to guess at the fund available for distribution on liquidation for it is the sum paid by the outside purchaser, the City. In a liquidation, the Court has no concern over preserving cash necessary to keep the enterprise running for that problem is one belonging to the outside purchaser. There can only be a cash shortage in the fund to be distributed and it can only arise if some security holders take more out of the fund than they are entitled to. Even if, as was the case here, the majority of the security holders wish to turn in their securities for fixed compromise prices, there still should be cash to pay those who wait to have their legal rights determined unless the other security holders have taken too much. Such a contingency may easily be guarded against by an appropriate reserve out of the compromise prices or by having the outside purchaser, as the City eventually did here in effect, agree to put up any funds needed to pay the legal cash distributive shares of non-assenters (R. 528-9, 532-4, 549, 553-4). Nor is any special difficulty caused by the payment in Corporate Stock, since it could easily be turned into cash, either by sale on the market or by resale to the City in accordance with the Plan (R. 102); and such a course was not even necessary as the petitioner, like the assenters, has always expressed his willingness to be paid in Corporate Stock (R. 328).

It is also suggested that the error in the Circuit Court's argument may be seen by considering the situation as it would have been had the City exercised its option to pay

all in cash (R. 107). Then the small cash distributive shares could not have been justified on the ground that they forced the security holders to take their Plan prices in securities. Nevertheless, it is submitted that the exercise of that option would not have made the proceedings any more or less a liquidation than the payment partly in Corporate Stock. Manhattan was not in the business of running an investment trust of municipal bonds, it was a railroad company. It took the Corporate Stock as a step in the winding up of its affairs, just as it might have taken United States Government Bonds or coal in payment for its assets, with a view to reselling them, if its security holders would have realized more from payment in those mediums in lieu of cash.

To summarize the matter, it is the petitioner's contention that on this liquidation, the price which must be deemed to have been paid for the assets of Manhattan is the price actually obtained for them from the outside purchaser, that is the Manhattan share of the $164,000,000 in cash and Corporate Stock. Surely, this must be the "proper price" under *First Nat. Bank* v. *Flershem,* 290 U. S. 504, page 526. To deprive the petitioner and those he represents of his share in the $164,000,000 by means of intermediate judicial sales which bring but $97,000,000 is to apply the technique evolved to make reorganization possible where liquidation is inadvisable to a situation where liquidation is deemed advisable by all and actually takes place.

The Circuit Court also stated that in its opinion the $18,000,000 total of the Settlement Fund was adequate although it gave little reason for this conclusion (R. 956-7). It gave no reasons in support of the allocation of the $18,000,000 as between the various issues of Manhattan securities and in particular for the amount of the allocation of over $9,500,000 to the Manhattan stockholders, other than their claim under the Manhattan Lease that

they were entitled to be paid something as creditors of Interborough (R. 959). It did not even decide that this claim of the Manhattan stockholders was valid (R. 960). It seems to set forth the doctrine that if one has a class claim it may be compromised, after notice and a full hearing, without the consent of any member of the class or representatives of the class, because some members of the class are in court protesting that they do not want to compromise on the basis suggested (R. 956-7); in other words, that a class of plaintiffs, unlike a single plaintiff, may be forced under Rule 23 (c) of the Federal Rules of Civil Procedure to accept a compromise against its will, if the compromise is thought fair by the defendants and the court. If the opinion does not mean what has just been said, it must mean that the assenters, who were entitled to their Plan prices and only their Plan prices regardless of the outcome of the class actions (R. 103-4), were persons "as will fairly insure the adequate representations" of the non-assenters under Rule 23 (a), in consenting to a compromise of a class action on behalf of the non-assenters. The propriety of this compromise is especially difficult to understand because the assenters making it obtained for the non-assenters they purported to represent only 80% of what they themselves were already entitled to receive; and the non-assenters could obtain for themselves, if they had been in a compromising mood, the better compromise already accepted by the assenters through the simple expedient of assenting during the ensuing six months (R. 562-5).

The Circuit Court also quotes from an opinion of this Court, dealing with a statutory reorganization, asserting the desirability of resolving conflicting claims to specific assets by compromise (R. 957). Can it not be assumed that the compromises referred to by this Court were compromises made on behalf of an entire issue of securities by persons who had an interest in seeing to it that the compromise was as favorable as possible to that issue and

not, as was the case here, compromises made on behalf of some of the security holders by others whose slight interest in the controversy being compromised was adverse to those they purported to represent.

The Circuit Court of Appeals seems to have had a feeling that the City of New York had a special power in these proceedings to affect legal rights (R. 953, 961). The City was, of course, the highest and only real bidder for the properties of the two companies on liquidation and, if it had not bid, all the security holders might well have fared worse; but clearly that fact alone did not give the City the power to change the ordinary priorities in the purchase price of the stockholders and creditors of the sellers. In the decision in *Murray* v. *Roberts*, 103 F. (2d) 889 which reversed the decision of the District Court permitting the Interborough receiver to disaffirm the Manhattan Lease, the Circuit Court held in effect that the Lease could not be disaffirmed unless the Manhattan and the City consented (see opinion, pp. 897-8). As a practical matter the City might have had the power to force a change in the terms of the Manhattan Lease and it could have used the possible existence of this power as a club to force Manhattan parties to accept a low, separate price for the Manhattan properties and their claims against Interborough. The City, however, offered a lump sum of $164,000,000 for both properties and did not buy the Manhattan claims against Interborough at all, and in doing so, stated that it did not care how the purchase price was allocated (R. 580-1). So long as the City kept this $164,000,000 offer alive, any change in the terms of the Lease, had one been made, would merely have enriched the Interborough parties at the expense of the Manhattan parties and would have gained the City nothing. Surely the unexercised power to make such a change did not make the legal rights of anyone in the $164,000,000 so indefinite that they could be fixed by simply taking 80% of the negotiated compromise Plan prices.

**(k) The Petitioner's Position**

The petitioner has never objected to the sale of the Manhattan and Interborough properties to the City for $164,000,000; he merely objects to the allocation of the proceeds (R. 319-29). The City of New York stood ready under the Plan to pay at least $500 in cash for each Bond represented by the petitioner (R. 102), and, since June 12, 1940, to indemnify any other person liable for the dissipation of any portion of the $164,000,000 fund to which the petitioner is legally entitled (R. 528-9, 532-4, 549, 553-4). Hence, a successful appeal would merely require payments by the City greater than the $394.68 now reserved for each of the 484 bonds, it would not necessitate the return of the properties to the companies or even additional payments to assenters. *First Nat. Bank* v. *Flershem,* 290 U. S. 504, 521. In a very real sense, this is nothing but a condemnation proceeding brought by the City against the petitioner's bonds.

The opportunity for holders of Manhattan Second Mortgage Bonds to assent and receive $500 in Corporate Stock expired on September 26, 1940 (R. 564-5). At that time, petitioner had the choice of either taking the $500 per Bond or, by prosecuting his appeal, seeking to have his legal rights really determined. The petitioner chose the latter course, although it involved the risk of receiving only $394.68 per Bond. After all, petitioner held Bonds in a company all of whose assets had been sold for proceeds distributed in large part to stockholders. He had always supposed that in such a liquidation the burden of showing why his Bonds should not be paid in full rested on his corporation and those who stood in its stead. He further felt that no reason had been shown to justify giving up 60% of his claim. It seemed unlikely to him that any appellate court would hold that negotiators, who had accepted for themselves and themselves only, a compromise of $500 per Bond on which $1,261.22 was due, could force him to accept over his objection a compromise of $394.68

per Bond, without having any of the valuation questions decided on the basis of what the City was paying or the legal questions decided at all.

## Specification of Errors to be Urged.

1. The Circuit Court of Appeals erred in affirming the decision of the District Court that the legal cash distributive share to which non-assenting Manhattan Second Mortgage Bondholders were entitled on the liquidation of their company was $394.68.

2. The Circuit Court of Appeals erred in not entering an order directing that the non-assenting holders of Manhattan Second Mortgage Bonds should receive (1) payment in full on the basis of the existing Record, or (2) a new trial to ascertain what amount in excess of $394.68 per Bond is their legal distributive share, or (3) $500 in Corporate Stock, the treatment accorded to assenting holders of Manhattan Second Mortgage Bonds.

## The Reasons Relied on for the Allowance of the Writ.

I. The Circuit Court of Appeals has decided several important questions of Federal law which have not been but should be settled by this Court as they will be of great importance in connection with plans for geographic integration and corporate simplication under Section 11 of the Public Utility Holding Company Act of 1935 and in connection with plans for liquidating corporations under the Bankruptcy Act. These questions are:

A. That on the liquidation of corporations by the sale of their assets for a fund of securities and cash having a value of approximately $164,000,000, the legal rights of security holders in the fund may be determined as if the assets had been sold for $97,000,000 in cash.

B. Either that under Rule 23(a) of the Federal Rules of Civil Procedure, those who have irrevocably accepted an offer on the liquidation of their corporation to sell their securities at a definite price are persons "as will fairly insure the adequate representation of all" other owners of the same issue of securities who have refused to accept that offer, in a class action brought to determine what those who refused the offer are legally entitled to receive; or that under said Rule 23(c), a compromise of a class action may be approved by the District Court even if no member or representative of the plaintiff class assents to the compromise, as long as some member of the class is in court objecting to the compromise.

C. Either that the burden is on the creditors of a corporation to show why they are entitled to be paid in full on liquidation, even though stockholders receive large amounts of municipal bonds and cash; or, that on the liquidation of a corporation, the burden on the corporation of showing why its creditors should not be paid in full is satisfied where a claim can be made that the stockholders are entitled to be paid an indeterminate amount as creditors of another corporation, even though the correctness of that claim is not decided.

II. The Circuit Court of Appeals has decided several Federal questions in a way probably in conflict with applicable decisions of this Court.

A. The rights of the non-assenting Manhattan Second Mortgage Bondholders have been fixed by judicial sales of the assets of Manhattan and Interborough for $97,000,000 when the City of New York was bound to pay for the properties cash and Corporate Stock having a value of approximately $164,000,000. Thus it is apparent that these orders and decrees ignore the bid of the City of New York, there-

by violating the rule of *First Nat. Bank* v. *Flershem*, 290 U. S. 504, 526-8, requiring that upset prices be based on the best bid which might have been obtained.

B. It has decided, that on the liquidation of two jointly operated corporations by the sale of their properties for a single sum, the District Court may determine that a plan under which offers are made out of the proceeds of the sale to purchase the outstanding securities of the corporations for stated amounts is fair, without allocating the purchase price paid to the assets purchased or making the other fundamental determinations required by *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510; and that on the basis of such a decision as to fairness, the District Court may force those who do not accept these offers in order that they may appeal, to take 80% of the amount refused, still without making the determinations required by that case.

C. It has decided that the rule in equity receiverships that every important determination by the court calls for the exercise of an informed independent judgment laid down in *National Surety Co.* v. *Coriell*, 289 U. S. 426, 436 and in *First Nat. Bank* v. *Flershem*, *supra*, 525, does not apply where the receivership culminates in liquidation rather than reorganization.

III. In affirming the District Court, the Circuit Court of Appeals has sanctioned a departure from the usual course of procedure which seems to us to require an exercise of this Court's power of supervision. In connection with the liquidation of two jointly operated companies, the District Court has approved a negotiated compromise plan of liquidation for those who wished to assent to it, which compromise gave large sums to stockholders. It has done this without making the determinations required by *Consolidated Rock Products Co.* v. *Du Bois*, *supra*, if even a plan of reorganization is to be found fair and equitable. It has not compelled acceptance of the compromise

plan, it has offered each non-acceptor the alternative of obtaining their "legal rights" by means of judicial sales and class actions "intended to make assent to the Plan more attractive than dissent", to quote the Circuit Court of Appeals (R. 957). To get such a result, it necessarily had to determine "legal rights" not on the basis of the fund paid for the assets of the two companies but on a lesser amount, here less than two-thirds of the fund; and it did in fact give 10% of the two-thirds to the Manhattan stockholders, without making any findings which justify the amount of this allocation to stockholders or any allocation at all. It is respectfully urged that this procedure is wrong. If creditors are to be protected on a reorganization because of what their rights would have been on liquidation, they are entitled to at least as much protection where liquidation takes place. Failure of this Court to act will once more revive the hope that stockholders may recover at the expense of the corporation's creditors if only the proceedings are complicated enough to partially disguise what has happened.

**Position of the Chase Bank.**

Since Paul E. Manheim is not a party to the two Foreclosure Actions in the United States District Court for the Southern District of New York, in which orders were entered by said District Court and affirmed by the Order of the United States Circuit Court of Appeals for the Second Circuit sought to be reviewed, and since The Chase National Bank of the City of New York, as successor Trustee under the Second Mortgage and Deed of Trust of Manhattan Railway Company dated June 1, 1913, under which the bonds owned or represented by Paul E. Manheim are outstanding, is a party to said two Foreclosure Actions, The Chase National Bank of the City of New York, as such Trustee, hereby joins, at the request of Paul E.

Manheim, in the foregoing Petition, for the sole purpose of protecting the rights, if any, of Paul E. Manheim and of the holders of the said bonds.

WHEREFORE it is respectfully submitted that this petition for a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit should be granted.

Dated, New York, N. Y., December 17, 1941.

LOUIS CONNICK
*Counsel for Petitioner Manheim*

HUGH L. M. COLE
*Counsel for Petitioner*
*The Chase National Bank*
*of the City of New York*

## Exhibit A.

Excerpt from the Manhattan Lease (Exhibit 4, Vol. III).

"ARTICLE SIXTH.—The Lessee hereby leases and hires from the Lessor the said railroad and railroads, franchises, rights, privileges, easements, real estate and property, hereinbefore mentioned, described and demised, for and during said term of nine hundred and ninety-nine years aforesaid, and upon the terms and conditions of this lease expressed, and the Lessee hereby covenants and agrees to pay to the Lessor and hereby guarantees to each owner of record of shares of capital stock of the Lessor, dividends, as rent, as hereinafter provided, for the term of two years and nine months from the 31st day of March, 1903. The Lessor hereby covenants and agrees, that prior to the date of payment of each of the instalments of rent provided for in this article, it will declare a dividend equal to such instalment, payable upon the date of payment of such instalment, * * *.

* * * * * * * *

No reduction of the guaranteed annual dividend rental or in the terms of years of this lease shall be made without the unanimous consent of the shareholders of record of the Lessor; provided, however, that nothing herein contained shall otherwise limit the lawful powers of the Board of Directors and shareholders of the Lessor to deal with the subject-matter of this lease and its provisions.

From and after the expiration of said two years and nine months, and from January first, 1906, the Lessee hereby covenants and agrees to pay to the Lessor, and guarantees to each owner of record of the shares of capital stock of the Lessor, as rent, an annual dividend of seven per centum (7%) of his holding of the capital stock of the Lessor.

The Lessee hereby covenants and agrees that it will each and every year during the term hereby granted, beginning with the first day of April, 1903, pay to the Lessor as rent for the demised property, and hereby guarantees to the respective owners of record of the shares of the Lessor, the said annual dividends free

of all charges, in quarter-yearly payments * * *; and the Lessee will from time to time execute in proper form a guarantee to the above effect, printed or engraved upon the certificates of stock of the Lessor; * * *.

The form of such Guarantee shall be as follows:

'Dividends amounting to six per cent. per annum and an additional amount, if earned, not exceeding one per cent. per annum, until January first, 1906, and after that date, dividends amounting to seven (7) per cent. per annum, upon the par value of the outstanding capital stock of the Manhattan Railway Company are guaranteed, and will be paid by the undersigned, in accordance with the terms and provisions of a certain Indenture made between the Manhattan Railway Company and the undersigned, dated the first day of January, 1903.

INTERBOROUGH RAPID TRANSIT COMPANY;
By Treasurer.'

Payment of dividends as above provided by the Lessee to the stockholders of the Lessor shall constitute payment of rent, in compliance with the foregoing covenants to pay the same to the Lessor."

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941—No. 806.

PAUL E. MANHEIM, as a Committee, and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee,

*Petitioners,*

*against*

VAN S. MERLE-SMITH, *et al.*, J. P. MORGAN, *et al.*, and J. HERBERT CASE, *et al.*, Contracting Committees, THE CITY OF NEW YORK, the TRANSIT COMMISSION and all other parties to Plan and Agreement to end the receivership of Interborough and Manhattan Companies, THOMAS E. MURRAY as Interborough Receiver and WILLIAM ROBERTS, Receiver of Manhattan Railway Company,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.


WILLIAM C. CHANLER,
*Corporation Counsel,*
*Attorney for The City of New York.*

WILLIAM S. GAUD, JR.,
*Of Counsel.*

CHESTER W. CUTHELL,
*Special Counsel to the Transit Commission.*

ROBERT W. MALONEY, JR.,
*Of Counsel.*

BOYKIN C. WRIGHT,
*Solicitor for Van S. Merle-Smith and others as a Protective Committee for Manhattan Railway Company Consolidated Mortgage 4% Gold Bonds.*

CLIFTON MURPHY,
DANIEL JAMES,
*Of Counsel.*


This brief is joined in by parties whose names appear on pages 42 and 43.


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IN THE

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OCTOBER TERM, 1941.

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PAUL E. MANHEIM, as a Committee, and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee,

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*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### Preliminary Statement.

The petition herein is filed by two parties: Manheim as a holder of Second Mortgage Bonds of Manhattan Railway Company and as attorney-in-fact for certain other minority

holders of such Bonds, and The Chase National Bank of the City of New York as Trustee of that issue. As is shown by pages 28 and 29 of the petitioners' Brief and as was aptly stated by Judge Swan in the Court below (R., p. 955):*

> "The Chase Bank, however, is only a nominal appellant, having taken its appeal at the demand of Manheim and only in order to enable him to obtain consideration by the court of arguments advanced by him against certain orders to which he was not a party. No independent contentions are presented by the Bank and its appeal requires no discussion independent of that devoted to Manheim's appeal * * *."

Indeed, as a result of action taken under provisions of the Manhattan Second Mortgage authorizing a majority of the bondholders to control the enforcement of their mortgage, the Chase Bank actually helped to bring about the results of which Manheim complains.

This brief in opposition to the petition is submitted upon behalf of (1) the Transit Commission of the State of New York, the agency charged by statute with the duty of preparing and adopting the Interborough-Manhattan Unification Plan, under which the properties of Interborough Rapid Transit Company and of Manhattan Railway Company were conveyed to the City of New York; (2) the City of New York; (3) the Contracting and Assenting Committees under the Plan; (4) the trustees under certain Manhattan and Interborough indentures; and (5) the Interborough and Manhattan receivers.

The decrees and orders here in issue brought eight years of most complex and burdensome litigation to a termination—a termination which has been deemed advan-

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* The opinion below is reported at 122 F. (2d) 454.

tageous by everyone concerned except Manheim and one Salomon, who has filed a separate petition for a writ of certiorari (No. 811, October Term, 1941). So complex is the unique factual background of this receivership, including numerous involved and interrelated documents, that such able and experienced Judges as Julian W. Mack and Robert P. Patterson each referred to it as the most complicated matter with which he had ever been faced. There is little wonder, therefore, that Manheim, who did not appear in this litigation until after the City made public its unification offers on June 23, 1939, has been able to present only a fragmentary and distorted statement of the facts in his petition and brief. And since the issues which he seeks to raise are essentially factual, it cannot be too greatly emphasized that his factual statement is not only inadequate but is also in part materially misleading. A statement of the more important facts upon which Judge Patterson's decrees and orders were founded is, therefore, necessary.

## The Facts.

At the outset, we wish to expose two fundamental fallacies which underlie Manheim's brief.

First, he maintains that Manhattan's stockholders were preferred at the expense of Manhattan's Second Mortgage Bondholders. They were not. Manhattan's physical properties were sold in foreclosure for $17,000,000 under the prior lien of the Consolidated Mortgage, which was in default as to both principal and interest in the amount of $44,244,000. Thus the Second Mortgage Bondholders had a standing only as general creditors of Interborough. And Manhattan's stockholders were long ago held by the New York State Courts to be direct contractual creditors of

Interborough by virtue of a guarantee stamped on their stock certificates by Interborough ten years before the Second Mortgage Bonds were issued. (See Point II, *infra*). As Judge Swan said after referring to the New York cases (R., p. 959):

> "Consequently the Manhattan stockholders did not receive anything as stockholders, but rather as general creditors of Interborough—a position the same as the Manhattan Second Mortgage bondholders, who themselves were participating only as general creditors of Interborough—all Manhattan physical assets having been exhausted by the Manhattan Consolidated Mortgage prior lien."

Secondly, Manheim attempts to convey the impression that, under the Unification Plan, there was available for distribution to security holders the sum of $164,000,000,* in which he, a non-assenting security holder, is entitled to share *pro rata*. This, too, is at odds with the facts. The Unification Plan contained a series of offers, separately negotiated by the City and the Transit Commission with each class of Interborough and Manhattan security holders, to exchange their securities upon certain stated terms. This was not a case in which physical properties were purchased for a lump sum. As partial proof of this, the City was required to make deliveries of Corporate Stock and cash only to the extent that securities were actually deposited under the Plan (R., Vol. II, fol. 1420 ff); deposited shares of stock were actually transferred of record to the name of

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* The Plan called for the issuance of an aggregate of $151,248,187.18 principal amount of Corporate Stock, assuming 100% assent by security holders. To this Manheim adds $6,700,000 of cash actually constituting part of the trust estates under two of the mortgages prior to the adoption of the Plan, as well as $6,029,078.31 to be retained out of the receivership cash for payments in lieu of interest on certain senior securities.

the City†; and both of the Courts below pointed out that, had the Plan been disapproved on the ground of stockholder participation, it would have been amended to drop out such participation with a saving to the City and without a corresponding advantage to any other class of security holders.

Manheim refused to exchange his securities on the terms offered by the City. Instead, he chose the alternative of being paid in cash his distributive share on a strict enforcement of his legal rights. His legal rights having proved less valuable than what was offered him by the City, he now seeks to disguise the true nature of the Unification Plan, and to portray it as a lump sum purchase in which he may participate. The error in this was clearly exposed by Judge Swan as follows (R., p. 961):

> "The record reveals that the City desired not only to acquire the property but also to satisfy security holders without eliminating any class. To this extent the participation of security holders can be viewed as offers made to them by the City in fulfillment of its program of unification, rather than a participation by them in a lump valuation of the corporation's assets."

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† This is among the facts showing the incorrectness of Manheim's assertion that the Manhattan Company purchased its own securities under the Plan. It is another example of his factual errors. No creditor of Manhattan had any dealings, direct or indirect, with Manhattan, its Board of Directors, or any representative of its stockholders regarding the participation of such creditor under the Plan. The Plan prices were not determined as Manheim says, again erroneously, "as a result of negotiations between groups of security holders" (Brief, pp. 3, 8); the negotiations as to price were conducted by each group of security holders with the City and the Transit Commission. Manheim's reference to this Unification Plan as a "liquidation" is founded upon such false premises as we are here analyzing, and the word "liquidation" does not become a weighty argument merely because of his insistent repetition of it.

(a) *The status of the Receivership Proceedings.* The Interborough subway lines were owned by the City of New York. They had been constructed and provided in greater part by funds of the City, and were operated by Interborough under operating or franchise contracts with the City. The principal properties owned by Interborough and pledged under its mortgages thus consisted of these contracts. The principal elevated lines in the Boroughs of Manhattan and the Bronx were owned by Manhattan Railway Company. In 1903 the elevated lines of Manhattan were leased to Interborough for a term of 999 years at a rental which included taxes, interest on all Manhattan bonds and guaranteed dividends on the Manhattan stock. Thereafter the Interborough and Manhattan properties were operated by Interborough or its receivership estate until June 12, 1940, when the City acquired these properties under the Unification Plan.

The eight years of the receivership were by no means happy ones for Interborough and Manhattan security holders. They were spent in protracted and expensive litigation, most of which centered around one chief question: the tangle of relationships between the two companies, their security holders and the City arising out of the various franchises, contracts and related certificates under which the transit properties had been constructed, leased and operated, including the Manhattan lease, which the Interborough receiver attempted to disaffirm.

When the Unification Plan entered the picture, this litigation had not been finally settled. The Circuit Court of Appeals had held in *Murray* v. *Roberts,* 103 F. (2d) 889 (1939), petition for certiorari dismissed per stipulation, 311 U. S. 720 (1940), that the Interborough receiver had certain franchise obligations to the City requiring him to

operate trains over parts of the Manhattan lines, and that he could disaffirm the Manhattan lease only if he could at the same time discharge Interborough's obligations to the City in a manner satisfactory to it. The Interborough parties applied for a writ of certiorari from this decision. Unification intervened prior to a decision on that application. Consequently, unification occurred at a time when the City was in a recognized position to affect materially and substantially the relative rights and obligations of the security holders of both Interborough and Manhattan by its decisions of policy on the question of operation. Both courts below emphasized the dominant and stragetic position occupied by the City as a result of this disaffirmance decision. As stated by Judge Swan, the effect of the decision was that (R., p. 953):

> "* * * because of certain franchise obligations to the City the lease could not be disaffirmed unless, as a result of negotiations with the City, these obligations could be performed by some means other than affirmance. This decision established the City's strategic position in the affairs of the companies and enabled it to prepare to press its unification objective."

Extensive but uncompleted litigation had also been had of the question of determining a proper formula for ascertaining the compensation to which Manhattan was entitled for the use of its lines by the Interborough receiver; of the value and extent of the claims and counterclaims totalling many millions of dollars which were asserted by the Manhattan parties against the Interborough parties, and *vice versa,* under the Manhattan lease; of the many millions of dollars of unpaid real estate and special franchise taxes on Manhattan properties which were due the City of New

York; and of the claims totalling many millions of dollars which the City asserted through the Transit Commission against the receiver for his alleged failure to account for earnings due to the City under the contracts pursuant to which the properties were operated.

Furthermore, the earnings of these properties had rapidly gone from bad to worse. The elevated earnings had been so poor as to show large operating losses even before the payment of taxes. The earnings of the entire system, after taking into account the substantial deficits from the operation of the elevated division, had fallen from $13,500,000 in 1935 to $6,400,000 in 1939. These earnings were insufficient even to provide for the interest and sinking fund requirements of the Interborough First and Refunding Mortgage Bonds, the interest and sinking fund of which went into default on January 1, 1939.

(b) *The Adoption of the Unification Plan.* Fortunately for the security holders of these two companies, the unification in City ownership and operation of all the rapid transit lines had long been the objective of both the State and the City.

The Transit Commission, which is a branch of the Public Service Commission of the State, wholly independent of the City, for half a century had been charged with the duty of supervising the development and operation of the City's rapid transit facilities. By Chapter 134 of Laws of 1921 the Legislature enacted what is now Article VII of the Public Service Law, pursuant to which the Transit Commission was directed to prepare a plan or plans of unification for the improvement of rapid transit in the City.* The

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* For the convenience of the Court, the relevant portions of this Article are set forth in an appendix to this brief.

Legislature declared that such a course was necessary to relieve the public emergency then existing.

The Legislature directed the Commission to make "the necessary studies and investigation" before preparing a plan. To accomplish this the Commission could and did use its existing powers to hold hearings and subpoena witnesses. The statutory mandate also provided (§123[2]) that "the commission shall outline an arrangement whereby outstanding securities of the railroad companies may be retired * * *." Furthermore, the duty was expressly enjoined upon the Commission by §123(4) of causing a valuation or valuations to be made of whatever transit facilities were to be included in a plan.

From 1921 until the adoption of the present Plan the Transit Commission worked continuously on this problem. Numerous tentative plans were prepared by the Commission after the making of extensive studies and valuations, but none of these was ever adopted. Then, on January 1, 1939, there took effect a new Article VIII, §7-a, of the State Constitution which had as its sole purpose the prompt accomplishment of unification. That provision authorized the City to issue, outside of its debt limit, securities in the principal amount of $315,000,000 for the acquisition of transit facilities and transit securities.

This new section of the Constitution vested in the City another power of even greater novelty and importance. Prior to January 1, 1939, the City had been expressly forbidden by Article VIII, §10, of the Constitution (now Article VIII, §1) to "become directly or indirectly the owner of stock in, or bonds of, any association or corporation." By the amendment, however, the City was authorized to acquire transit securities and to issue its own securities

directly to the holders of transit securities. This power made possible the adoption of the present Plan, calling for an exchange of Interborough and Manhattan securities for City securities and cash.

Following these changes in the Constitution, the Mayor and the Transit Commission re-opened negotiations with representatives of the various classes of security holders. These negotiations came to a head in the summer of 1939. Agreement was then reached with representatives of many classes of security holders upon the terms of a tentative Plan, which was prepared and promulgated by the Transit Commission with the cooperation of the City authorities and representatives of the security holders. The required public hearings were held on the Plan in tentative form before the Transit Commission on August 8, 9, 15, 16 and 22, 1939. At these hearings, representatives of all classes of security holders appeared and were heard; and after the close of these hearings, the Commission, by formal resolution, adopted the Plan after finding fair and equitable the offers to security holders contained therein (R., Vol. I, fols. 466-493). The Plan was then approved by the Board of Estimate of the City (R., Vol. I, fol. 494), and was executed by the City, by representatives of most of the security holders and by Manhattan Railway Company. In addition, it has since been executed by other representatives of security holders.

The Plan called for the securing of assents by the deposit of securities. The required percentages having been secured within the time specified in the Plan, the Transit Commission, by resolution adopted November 22, 1939, declared the Plan to be operative (R., Vol. I, fol. 1153). Finally, after the completion of the various procedural steps required for its consummation, including ex-

tensive proceedings before the District Court, a part of which are hereinafter discussed, the Plan was consummated on June 12, 1940.

(c) *The Nature of the Unification Plan.* In view of the attitudes of both the City and the security holders, it was out of the question for the City to acquire the transit properties in consideration of the payment of a lump sum, which would thereafter be split up among those who had an interest in the properties. On the one hand, the City was determined to use the new power granted it by the Constitutional Amendment, as well as the strategic position given it by the Circuit Court's disaffirmance decision, in such a way that no class of security holders, whose investments had gone to build up the City's transit system, should be excluded from participation in its Plan. Each class of security holders, on the other hand insisted that it negotiate its own treatment with the City and with the Transit Commission.*

The Plan adopted by the Transit Commission had these chief characteristics: First, it provided for an exchange of securities. Second, it provided that such exchanges should be on the stated bases which had been separately negotiated with the several classes of security holders by the City and the Transit Commission. Third, it permitted the City to acquire whatever securities might be deposited under it, regardless of their class or amount and regardless of whether the properties themselves were acquired under the Plan. Fourth, it made provision for a method of consummation which required assenters to deposit their

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* The offers to each class are shown in Judge Swan's opinion (R., p. 954).

securities for exchange, and also required the Contracting and Assenting Committees to agree to use their best efforts to bring about foreclosure and receivership sales and the settlement of the reciprocal claims, prior to the consummation of the Plan. And fifth, it provided that non-assenters should receive in cash their legal distributive shares, as determined by the Court, in the assets of the companies. Thus, in addition to meeting the City's requirement that it be permitted to negotiate separately the treatment to be accorded each class of security holders, the Plan assured the City of gaining prompt title to the properties themselves, it obviated protracted claims litigation in which the City had a substantial creditor interest, and it prevented security holders from having to make a blind decision as to whether or not to assent to the Plan.

(d) *Deposits Under the Plan.* The City's offers became effective when the Plan was formally adopted on August 29, 1939, and they were kept open until September 26, 1940. The following table shows the principal amounts or numbers of shares of the various classes of securities outstanding, the percentages thereof which were deposited under the Plan on November 22, 1939, when the Plan was declared operative by the Transit Commission (R., Vol. I, fol. 1158) and on June 4, 1940, just prior to consummation of the Plan (*ibid.*, fol. 1266) and the final percentage of deposits:

| Name of Security | Principal amount or number of shares outstanding | Deposits at November 22, 1939 | Deposits at June 4, 1940 | Final deposits |
|---|---|---|---|---|
| Interborough First and Refunding Mortgage 5% Gold Bonds | $97,195,000 | 76.66% | 94.76% | 99.62% |
| Interborough Ten-Year Secured Convertible 7% Gold Notes | $31,672,100* | 80.65% | 95.29% | 99.68% |
| Manhattan Consolidated Mortgage 4% Gold Bonds | $40,670,000 | 83.27% | 97.56% | 99.81% |
| Manhattan Second Mortgage 4% Bonds | $ 4,523,000 | 83.27% | 84.98% | 88.42% |
| Manhattan Guaranteed 7% Stock | 43,510 shs. | 27.55% | 82.14% | 96.26% |
| Manhattan Modified Guaranteed 5% Stock | 556,490 shs. | 63.27% | 93.63% | 99.10% |
| Interborough Ten-Year Unsecured 6% Gold Notes | $10,500,000 | 10.74% | 29.19% | 98.79% |
| Interborough Common Stock | 350,000 shs. | 9.40% | 17.25% | 96.59% |

* Original principal amount of notes outstanding. As a result of payments on account of principal during the receivership, the principal amount of indebtedness represented by these notes had been reduced to $28,716,459.69.

### The Status of the Petitioner Manheim.

Since the Unification Plan consisted of a series of offers by an outside purchaser to the holders of Interborough and Manhattan securities, its success depended entirely upon the voluntary acceptance of those offers by individual security holders. It was recognized from the outset that some might be unwilling to accept them. Provision was accordingly made for the payment to non-assenters of such amounts of cash as the District Court

should determine they were entitled to in accordance with their legal rights. As a result, foreclosure and receivers' sales were had, and in addition, after lengthy proceedings in which much evidence was taken and all persons affected were heard, the Court effected a settlement of the reciprocal Interborough-Manhattan claims, which were not sold in foreclosure and remained to be disposed of. These various proceedings resulted in the entry of orders and decrees which, among other things, determined that each non-assenting Second Mortgage Bondholder was entitled to receive, in cash, $394.68.

Manheim is a non-assenting holder of Second Mortgage Bonds. Those Bonds sold at very low prices for some years prior to the adoption of the Unification Plan. On March 31, 1938 their price on the New York Stock Exchange was $130, on March 31, 1939 it was $250, and on May 1, 1939, less than two months before the terms of the Unification Plan were announced, it was $260 (R., Vol. VI, doc. 34, Schedule C-2). Manheim nevertheless chose to reject the City's offer of $500 in Corporate Stock for each of his Bonds.*

The position taken by Manheim has been succinctly stated by Judge Swan (p. 955):

> "The scope of Manheim's appeal is restricted to those provisions of the court's orders which limit him as a non-assenting bondholder to the recovery of $394.68 per thousand dollar bond. He asserts no wish to upset the transfer of the properties to the City or to change the participation of assenting security holders, but he asks for an order directing that the bonds he owns or represents be paid in full,

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* The record does not disclose when, or at what prices, the bonds represented by Manheim were purchased, despite the fact that it has been held that minority bondholders who invoke the aid of a court of equity should fully disclose their status. See *Palmer* v. *Bankers Trust Company*, 12 F. (2d) 747, 754 (C. C. A. 8th, 1926).

> or, in the alternative, that a new hearing be granted to determine what amount in excess of $394.68 he is entitled to receive, or at least that he be given an amount equal to what he would have received had he assented to the Plan."

See to the same effect Manheim's Brief (pp. 3, 6-7).

We will have more to say later as to the fact that this petition presents no question of sufficient public interest or importance to warrant the issuance of a writ of certiorari by this Court. But first we wish to discuss briefly the proceedings which resulted in Judge Patterson's determination, unanimously affirmed by the Circuit Court, that the legal distributive share of each Second Mortgage Bond was $394.68.

## POINT I.

### Nothing about the Foreclosure of the Consolidated Mortgage Calls for Review by this Court.

As a Second Mortgage Bondholder, Manheim's position was junior to that of the holders of Manhattan's Consolidated Mortgage Bonds. It has never been disputed that the Consolidated Mortgage was a first lien on all Manhattan physical properties. Moreover, the Consolidated Mortgage has never been out of serious default since 1933, either for failure to pay interest or for failure to pay taxes or both.*

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* At the time of the entry of the Final Decree of Foreclosure and Sale on December 11, 1939 (R., Vol. I, fol. 559), there were the following defaults under the Consolidated Mortgage: (1) bond interest was in default to the extent of $3,253,586.24 (*ibid*, fol. 611); (2) $1,915,554.02 of taxes were unpaid and in default (*ibid*, fol. 614); (3) $8,950,260 had been paid in Consolidated Mortgage Bond interest and $2,503,736.40 had been paid in taxes under conditional forms of order which reserved the question of whether such pay-

As early as September 28, 1932 the trustee of the Consolidated Mortgage had commenced an accounting action to secure an impounding of all the rents, issues and profits of the mortgaged properties. Then, on March 16, 1934 the trustee filed a bill of foreclosure pursuant to leave of the District Court (R., Vol. VII, doc. 45, pp. 4695, 4699). There followed the appointment of a Special Master, who, after holding hearings and taking evidence, rendered a report on July 12, 1938, to which no exceptions were ever filed by anyone (*ibid.*, doc. 46, p. 10, 478).

At this time a crisis arose out of the City's threat to sell its tax liens on the Manhattan properties. There were then outstanding unpaid taxes of over $9,000,000. As the Circuit Court held on an appeal from the District Court, the City had full power to sell such tax liens. *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.*, 98 F. (2d) 72 (1938). To meet this threat, the Sixth Avenue line, the only earning elevated line, was sold for $12,500,000 upon partial foreclosure of the Consolidated Mortgage, and the defaulted tax liens of over $9,000,000 were paid with part of the proceeds. Judge Patterson, who presided in the District Court over the foreclosure proceeding now under attack, also presided over such partial foreclosure proceeding, which was bitterly contested at every point by Manhattan Railway Company, its stockholders and a small

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ments should ultimately be charged against the Manhattan properties ahead of the lien of the Consolidated Mortgage, so that such defaults were not unconditionally cured (*ibid*, fols. 611-614); (4) the trustee of the mortgage had had to pay $9,010,655.79 to The City of New York out of the proceeds of the sale of the Sixth Avenue line in order to save the mortgaged properties from being lost completely through the enforcement of tax liens which had accumulated from 1933 to 1938; and (5) the principal of the mortgage debt itself in the amount of approximately $40,670,000 had been duly declared due and payable and was in default (*ibid*, fol. 616).

minority of its bondholders. A most complete record was made before Judge Patterson on the matter of valuing the Sixth Avenue line, which necessitated a valuation of the Manhattan properties generally in order to fix consequential damages. The Circuit Court of Appeals affirmed Judge Patterson's decree and certiorari was later denied by this Court. *Manhattan Railway Company* v. *Central Hanover Bank and Trust Company*, 99 F. (2d) 789 (1938), *cert. denied* 306 U. S. 641 (1939).

Because of serious defaults, the principal of the Consolidated Mortgage Bonds was declared due on November 2, 1939 by the Merle-Smith Committee representing the holders of a majority of such Bonds (R., Vol. I, fol. 616), after the entry of an order approving such declaration (*ibid.* fol. 499) entered upon a petition praying for such approval (*ibid.* fol. 109). The mortgage trustee thereafter served and filed a supplemental complaint (*ibid.* fol. 523), bringing the defaults up to date, and Judge Patterson signed an order to show cause why a final decree of foreclosure and sale fixing upset prices should not be entered (*ibid.* fol. 536). Lengthy hearings were then held on November 27, December 5 and December 11, 1939, at which Manheim and his trustee were present.

Evidence was presented on all conceivable theories of valuation, and the fullest opportunity was given to all parties and interested persons to submit any evidence or to make any arguments which might have a bearing upon the fixing of the upset prices. We do not propose to review that evidence here. We do think, however, that the Court should be informed of the general nature and scope of the foreclosure record.

It suffices to mention briefly the testimony of the two principal witnesses and the exhibits introduced through

them. The first of these was Henry T. Berry, who had been Comptroller for Interborough and its receiver since 1924, prior thereto had been employed in the Accounting Department of Interborough beginning in 1903, and prior to 1903 had been in the Accounting Department of Manhattan (R., Vol. II, fols. 1838-1839). The second of these two important witnesses, George W. Burpee, was the member of the engineering firm of Coverdale & Colpitts in charge of work for Manhattan and had been connected with such work since 1921, had acted as engineer for the Manhattan receiver throughout the receivership and had testified in the formula proceeding and the proceeding involving the sale to the City of the Sixth Avenue elevated line (R., Vol. II, fols. 1939-1943).

The following is a tabulation of the more important evidence on valuations which was before the Court:

(1) *Earnings Record and Valuations Based Thereon:*

Results of operation of the Manhattan [elevated] Division, consisting chiefly of Manhattan mortgaged properties, including a breakdown of operating expenses, for the nine months ended September 30, 1939 (actual) and for the year 1939 (three months estimated), showing for the year an operating loss before taxes of $1,500,000 and after taxes and certain minor rentals of $3,797,000 (R., Vol. II, fols. 1840-1858, Vol. VI, doc. 32 and Vol. VIII, docs. 59 and 60).

Estimated operating results of Manhattan Division for year 1940, showing loss before taxes of $1,800,000 and after taxes and certain minor rentals of $4,100,000 (R., Vol. II, fols. 1859-1865, and Vol. VIII, doc. 61).

The decline of elevated income and earnings for the fiscal years ended June 30, 1934 to June 30, 1939 (R., Vol. II, fols. 1865-1869, and Vol. VIII, doc. 62). as follows,

the first line showing operating results before taxes and the second line showing results after taxes and certain minor rentals (italics indicating deficits):

| 1934 | 1935 | 1936 | 1937 | 1938 | 1939 |
|---|---|---|---|---|---|
| $2,187,046 | $1,595,463 | $1,381,984 | $ 916,925 | *$ 445,330* | *$1,141,727* |
| 144,144 | *645,040* | *1,000,106* | *1,560,212* | *3,025,060* | *3,527,987* |

Estimated results of operating Manhattan owned properties, as distinguished from those of the Manhattan Division, showing a net loss for one year before taxes of $861,000 and after taxes of $2,958,800 (R., Vol. II, fols. 1968-1985, and Vol. VIII, doc. 67).

Estimated results of operating only Third Avenue elevated line and Manhattan power plant for one year on assumption that Second Avenue line and Ninth Avenue line were condemned by the City pursuant to two statutes then recently enacted (New York Laws of 1939, Chapter 475 and 476), showing net revenue before taxes of $318,000 and a loss after taxes of $990,000.

Estimated results of operating Manhattan properties for one year with Interborough operating certain through train service under an assumed trackage agreement which conceivably could have resulted from negotiations with the City, in accordance with the disaffirmance decision of the Circuit Court of Appeals, showing income after taxes but before interest of $22,600 (R., Vol. II, fols. 1997-2011, and Vol. VIII, doc. 69).

(2) *Engineering Valuations:*

Historical cost of Manhattan properties ($111,000,000) and reproduction cost new at 1930 price levels ($163,000,000) (R., Vol. VIII, docs. 65 and 66).

Assessed value ($42,643,497), based principally upon engineering valuations and being contested in the State courts at the time the Unification Plan was adopted (R., Vol. II, fol. 2633).

(3) *Stock Market Appraisal:*

Schedule showing price ranges of Consolidated Mortgage Bonds on New York Stock Exchange from December 1, 1933 to November 15, 1939, with a low of $7,320,600 ($180 per Bond) at March 31, 1938, and a high of $30,705,850 ($755 per Bond) at November 15, 1939, and showing that such prices rose and fell with the hope of unification (R., Vol. VI, doc. 33).*

(4) *Scrap Values:*

Scrap value of $326,000 to $350,000 for Manhattan system apart from power plant and miscellaneous real estate, and value to Interborough of $6,000,000 to $8,000,000 for power plant if, in the future, it wished to purchase a plant producing power of low frequency which could not be adapted to other than transit uses without a "large expenditure" (R., Vol. II, fols. 1958-1968).

Finally, Mr. Burpee testified as to his expert opinion on the value of the Manhattan properties (R., Vol. II, fols. 2022-2025). He stated that he took into consideration the fact that unification was a very real probability, the possibility of a new arrangement between Interborough and Manhattan for the continuation of through service

* The stock market appraisal of course included not only the physical properties but also the sum of approximately $6,400,000 held by the Trustee of the Mortgage and the claims of the Consolidated Mortgage Bonds against Interborough, ultimately settled at approximately $6,666,000 in cash (R., Vol. I, fols. 1232-3).

at a 5¢ fare, the various estimated results of operating Manhattan independent of Interborough, or of operating merely the Third Avenue line and power plant in the event that the Second and Ninth Avenue lines were condemned, the rising trend in wages and in fuel and material costs, the general downward trend in traffic, the order of the Transit Commission requiring the expenditure of $3,625,000 to $4,360,000 for the installation of signals, the stock market appraisal of the property, etc. With all these factors before him, he stated that he would advise the owners of the Manhattan properties, who already had their investment in the properties, that he would regard a fair price to be between $15,000,000 and $20,000,000. He further stated, however: "I would not advise any purchaser other than the City of New York to pay that price, no, sir."

Brief as it is, the foregoing tabulation and discussion is sufficient to show the misleading character of Manheim's statement (Brief, p. 13) that "the Manhattan properties were sold at an upset price fixed by the District Court on the basis of testimony given that very day by a single expert * * *." Any statement or inference that the Manhattan upset price was fixed after only cursory consideration by the Court is so completely at variance with the facts as to be without extenuation or excuse. The demonstrable fact is that every conceivable basis of valuation was in the record. Manheim himself has never been able to point to any theory of valuation or evidence on valuation which is not in the record.

Plainly, the price of $17,000,000 which Judge Patterson fixed for the Manhattan physical properties was eminently fair and adequate, and the Circuit Court of Appeals was completely correct in its statement that "Complaint as to the upset price of $17,000,000 is not justified" (R. 956).

We do not concede that there is any validity in Manheim's attempt to test the Manhattan upset price against the offers to security holders made in the Plan. However, if the Manhattan upset price is to be tested against the Plan, the upset price certainly is not out of line. The amount which would have gone to the Consolidated Mortgage Bondholders under the Plan, assuming that they all assented, was $33,552,750, payable chiefly in City Corporate Stock (R., Vol. I, fol. 460). If we deduct from that sum the $6,400,000 of cash held by the mortgage trustee, and the $6,666,000 for which the claims of these Bonds were settled, the resulting figure is in the neighborhood of $20,000,000. And this is $20,000,000 payable chiefly in Corporate Stock, as against $17,000,000 payable entirely in cash. Here, as throughout his brief, Manheim relies upon the obvious fallacy that there is complete equivalence between Corporate Stock and cash. But, as the Circuit Court of Appeals pointed out, the City was not a purchaser for cash, and the assenting security holders undertook the risk of the City's credit (R., pp. 958-959). The Unification Plan was consummated at a time when the City's 40-year 3% Corporate Stock, payable on June 1, 1980, was selling at 90. A week before it had sold at 88¼. Between that time and the present there has been a spread of 23½ points between its low of 88¼ and its high of 111⅝. With such a spread in a period of approximately 1½ years, it is obvious that those who agreed to accept these securities in lieu of cash were assuming a very real risk. Indeed in September, 1933, at which time the City had outstanding no long term 3% Corporate Stock, the City's 4½'s of 1981 sold as low as 68, or on a yield basis of 6.25%. City securities of the same maturity, but bearing a 3% and not a 4¼% coupon, would have sold at 52½ to give the same

yield. And prices of 68, 60 and 52½ for $151,000,000 of Corporate Stock result in values of $102,680,000, $90,600,000 and $79,285,000, respectively. These considerations give full support to Judge Swan's opinion, in which he said (R., pp. 958-959):

> "The recipients of Corporate Stock did not, it is true, get securities representing a risk in the reorganized business only, but they did undertake the risk of the City's credit. As such we think their position analogous to that of assenters in the ordinary receivership reorganization, justifying their participation at a larger percentage of the face amount of their claims than the cash shares of dissenters."

Even upon the basis of the Plan figures and disregarding the fact that under the Plan securities had to be accepted in lieu of cash, Manheim is an impossible distance from boosting the foreclosure price from $17,000,000 to $31,000,000, which it would have to be if, added to the $6,400,000 and the $6,666,000 referred to above, it was to result in the payment of the $44,244,000 due for principal and interest on the Consolidated Mortgage Bonds. On no conceivable theory could the upset price be raised to that amount. Manheim is not a holder of Consolidated Mortgage Bonds, but only of Second Mortgage Bonds. If the upset price should have been $20,000,000 or $25,000,000 or even $30,000,000, instead of $17,000,000, only a dissenting Consolidated Mortgage Bondholder could object. Unless the upset price should have been in excess of $31,000,000, a dissenting Second Mortgage Bondholder could not be benefited by a re-trial of the foreclosure case, and he has no standing to complain.

One word more should be said concerning Manheim's treatment of the Manhattan upset price. It is to be observed

that nowhere does he set forth any analysis of the evidence which would indicate justification for a higher price. As in the courts below, he contents himself with the mere assertion that the sum of the City's offers to both Interborough and Manhattan security holders under the Plan was $164,000,000, that the sum of the amounts payable in cash to both Interborough and Manhattan non-assenters is $97,000,000, and that therefore (a *non sequitur*) the Manhattan upset price should be higher. The reason why Manheim does not analyze the evidence on actual values is that any such analysis shows clearly that the $17,000,000 upset price for these obsolete elevated lines was an exceedingly liberal price. We do not admit that the upset price fixed upon foreclosure of the Interborough Mortgage was inadequate or unduly low in the light of the unique circumstances there presented. But if there be any validity in Manheim's contention that the sum of the Interborough and Manhattan upset prices plus the total amount at which the claims of the respective classes of the Manhattan securities were settled should have approached more nearly what he calls the "Plan price," then it is obvious that any such insufficiency or inadequacy is a result of the upset price fixed for the Interborough properties and not in any degree whatever of the price fixed for the Manhattan properties. If we assume *arguendo* that the less than ½ of 1% of the Interborough bondholders who did not assent received less than the full measure of their legal rights, Manheim as a Second Mortgage Bondholder of Manhattan certainly has no standing to complain on their behalf.

## POINT II.

**Manheim Fails Utterly to Show any Legal Question Requiring Review by This Court on the Matter of the Enforcement of the Manhattan Second Mortgage Bond Claims against Interborough.**

**(1)**

Manheim's further attack is on the amount determined to be payable on the claims of the Manhattan Second Mortgage Bonds against Interborough. His argument on this point is founded almost entirely upon his assertion of unjust treatment because payments were also made upon the creditor claims of the Manhattan stockholders against Interborough.

Such assertion is based upon a premise which is demonstrably fallacious. The Transit Commission, the City, the parties to the Unification Plan, the District Court and the Circuit Court of Appeals have all recognized that both for purposes of the Plan and for purposes of enforcement of their legal rights, not one cent was given to Manhattan stockholders as Manhattan stockholders. Their only participation in the Plan, and the only payments made to them upon enforcement of their legal rights, were accorded them in their capacities as direct contractual creditors of Interborough.

Manheim can cast no doubt on the well-established status of the stock by stating or assuming, inaccurately, that such status is undecided (Brief, pp. 5, 15). The holders of this very Manhattan stock have been determined by the courts of New York to have a direct contractual claim against

Interborough—a claim which is not derivative and which need not be enforced through the Manhattan Company.

*Peabody* v. *Interborough Rapid Transit Company,* 212 App. Div. 502 (1st Dep't, 1925);

*Peabody* v. *Interborough Rapid Transit Company,* 124 Misc. 801 (Sup. Ct., N. Y. Co. 1924) aff'd without opinion 213 App. Div. 857 (1st Dep't 1925), aff'd without opinion 240 N. Y. 708 (1925);

*Bowers* v. *Interborough Rapid Transit Company,* 121 Misc. 250 (Sup. Ct., N. Y. Co., 1923), aff'd without opinion 208 App. Div. 768 (1st Dep't 1924).

Actually, it would have been immaterial if the status of the Manhattan stockholders as creditors of Interborough had been doubtful and uncertain. Even without the decisions cited above there could have been no question that the Manhattan stockholders had at least a very real, colorable claim to be treated as direct contractual creditors of Interborough. And if such claim had been disputed by Manheim, certainly the Court would have had full power to determine the issue by compromise and settlement. This power of the Court was recognized by Judge Swan, when he said (R., p. 960) that the settlement order "established by compromise the legal rights of the Manhattan stockholders to share as creditors, so that now their status as such cannot be questioned."

**(2)**

The settlement and determination of the specific amounts payable upon the claims of the respective classes of Manhattan security holders against Interborough were made only

upon the most complete record and with the fullest opportunity given to all security holders to present proofs of claim, introduce evidence, and be heard in argument. Moreover, the Second Mortgage Bonds were fully represented before the Court, not only by counsel for the petitioner Manheim, but also by Chase Bank as Trustee of the Manhattan Second Mortgage, by Curtis, Belknap & Webb, representing a majority of the Second Mortgage Bonds, and by the Wassner Committee for such Bonds, all of whom participated actively in the hearings.

It is impossible within the confines of this brief to do more than tabulate the various matters upon which full evidence was before the Court. All the documents having any bearing on the claims were before it—the lease, all supplements thereto and modifications thereof, the two Manhattan mortgages, the various franchise contracts with the City of New York. The seven proofs of claim filed on behalf of the various Manhattan interests and on behalf of the Interborough receiver, including answers thereto (R., Vol. V, docs. 20 to 26), were before the Court. The various formulas for the determination of the amounts to which Manhattan should be entitled for use of its property during the receivership period, and the 3,625 pages of testimony and 203 exhibits in the formula proceeding, were made part of the record on claims (R., Vol. V, docs. 27 to 29, and Vol. II, fol. 2342). Complete schedules showing rental items due under the Manhattan lease to various dates which were claimed to be applicable by various parties were in evidence (R., Vol. VI, doc. 38 and Vol. II, fols. 2253 and 2258).

The lack of earnings of the elevated lines was shown by schedules and supported by expert testimony (R., Vol. VIII, docs. 60, 61 and 62, and Vol. II, fols. 1865-1869, 2258-2263). The results of applying the Manhattan receiver's

formula (R., Vol. II, fols. 2342-2369, and Vol. VIII, doc. 80) and of the Interborough receiver's formula (R., Vol. II, fols. 2540-2542, and Vol. VIII, docs. 84 and 85) were in evidence. There were also in evidence the results of operating the entire Interborough system after deducting losses from the operation of the elevated lines (R., Vol. VIII, docs. 70, 71 and 72, and Vol. II, fols. 2263-2266).

The record also contained full testimony and other evidence on the following matters:

materials and supplies turned over to Interborough by Manhattan at the commencement of the term of lease (R., Vol. II, fols. 2290-2291);

rolling stock turned over to Interborough at the commencement of the lease, its value, condition and cost of replacing outmoded rolling stock (R., Vol. II, fols. 2303-2328, 2575-2585, 2593-2602, Vol. VIII, docs. 74, 75 and 76);

the condition of the elevated structure and stations (R., Vol. II, fols. 2328-2336, 2553-2561, Vol. VIII, docs. 77 and 78);

the cost of restoring Manhattan power facilities which had been dismantled by Interborough (R., Vol. II, fols. 2337-2342, and Vol. VIII, doc. 79);

the various claims of the Manhattan Modified Stock (R., Vol. II, fols. 2278-2285, 2436-2461, and Vol. VI, docs. 39, 40 and 41);

the damage claimed by Manhattan because of the taking of the Sixth Avenue elevated line in order to pay over $9,000,000 of delinquent taxes in 1938 (R., Vol. II, fols. 2462-2467, 2617-2618);

claims of the City based upon alleged improper accounting by Interborough under the main subway operating contract (R., Vol. II, fols. 2489-2493, and Vol. VIII, docs. 81 to 83);

the order of the Transit Commission requiring installation of automatic signals on elevated lines at an estimated cost of $3,625,000 to $4,360,000 (R., Vol. VIII, doc. 63); and

Interborough's claims against Manhattan for improvements upon Manhattan properties (R., Vol. II, fols. 2506-2511, 2519).

In addition to all the foregoing evidence, the Court had before it the important considerations arising out of the decision of the Circuit Court of Appeals having to do with the franchise rights of the City against Interborough and with the disaffirmance of the Manhattan lease. *Murray* v. *Roberts,* 103 F. (2d) 889 (1939), petition for certiorari dismissed per stipulation, 311 U. S. 720 (1940).* Moreover, Judge Patterson had before him an application by the Interborough receiver for an interpretation of the disaffirmance decision which would have rendered illusory that decision's apparent benefits to the Manhattan parties. Judge Patterson also knew that the Interborough interests contended strongly that, far from being entitled to the claimed priority for past due rentals, Manhattan must respond to Interborough for its operating losses under the well-established "net earnings rule"; and he knew also that Interborough claimed to be entitled to an offset of some

* Manheim's brief is both incorrect and misleading in saying, at page 23, that under this decision the Manhattan lease could not be disaffirmed unless Manhattan and the City consented. Manhattan alone was powerless to prevent such disaffirmance; for there can be no shred of doubt that, had the City relieved Interborough of all or any part of the franchise obligations which Interborough owed the City, Manhattan would have been entirely helpless and would have had to be content with anything the City and Interborough agreed upon. Manhattan's properties were running at a loss; any operation which would have kept them running and prevented a complete loss through tax lien foreclosures would have been a welcome boon.

$42,000,000 against certain of the more important claims of Manhattan.

It was with such a complete record and after full argument that Judge Patterson determined the amounts which the respective classes of Manhattan security holders should be entitled to collect on their claims. The amount allowed to holders of Second Mortgage Bonds was $1,785,000, or $394.68 per $1,000 Bond.

Neither here nor in the Circuit Court of Appeals nor in the District Court has Manheim analyzed or even listed the Second Mortgage claims upon which he relies. Instead, as stated above, he relies entirely upon his fallacious premise that the Second Mortgage Bonds should be entitled to more because persons who were Interborough contractual creditors, and who were paid as such, happened also to be Manhattan stockholders. This argument Judge Swan forcefully rejected, saying (R., p. 960):

> "As participation of Manhattan stockholders was in the capacity of general creditors of Interborough, a status not inferior to the Manhattan Second Mortgage bonds, it cannot be attacked by Manheim as a holder of such bonds."

**(3)**

There is no mystery about the legal basis on which Manheim and the other Second Mortgage Bondholders are bound by the order of March 15, 1940, settling the claims. There are three distinct and well-recognized grounds underlying that order.

(a) A court of equity in a receivership proceeding has broad equity powers to dispose of controversies by compromise and settlement. The procedure adopted here was patterned upon the doctrine which has been given expression

in the opinion of this Court in *Case* v. *Los Angeles Lumber Products Co., Ltd.*, 308 U. S. 106 (1939), where this Court said (p. 130):

> "There frequently will be situations involving conflicting claims to specific assets which may, in the discretion of the court, be more wisely settled by compromise rather than by litigation. Thus, ambiguities in the wording of two indentures may make plausible the claim of one class of creditors to an exclusive or prior right to certain assets as against the other class in spite of the fact that the latter's claim flows from a first mortgage. Close questions of interpretations of after-acquired property clauses in mortgages, preferences in stock certificates, divisional mortgages and the like will give rise to honest doubts as to which security holders have first claim to certain assets. Settlement of such conflicting claims to the *res* in the possession of the court is a normal part of the process of reorganization. In sanctioning such settlements the court is not bowing to nuisance claims; it is administering the proceedings in an economical and practical manner."

Similarly, in the more recent case of *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 523 (1941), although this Court condemned as a "concealed compromise" the device of merely extinguishing claims without notice to the parties and without a proper record before the court, this Court recognized that "the claim might be settled, with the approval of the Court after full disclosure and notice to interested parties * * *."

The direction of this Court in the *Los Angeles Lumber Products Co.* case, *supra*, is that the chancellor should administer proceedings "in an economical and practical manner." The chance in this case for non-assenters as well as assenters to realize substantial values on Man-

hattan claims presented itself only because of the City's desire for unification.* The City repeatedly stated that because of world and market conditions unification would have to be accomplished promptly or not at all. It gave no assurance that its offers would not be withdrawn. Its offers were conditioned upon prompt and final settlement of the claims litigation. Neither the City, the Interborough 5% Bondholders nor the Interborough 7% Noteholders (the senior securities of Interborough) were willing to bind themselves to a plan which left undetermined the extent of ultimate liability which one or more of them might have had to pay had the claims been left to future litigation. The claims were therefore in the nature of perishable or disappearing assets and had to be dealt with promptly. They had to be determined not only as a part of the foundation for the Court's action on the Plan, but also because the only alternative to a plan conditioned upon prompt settlement of the claims was no plan at all. That alternative spelt disaster for security holders of all classes, particularly Manhattan security holders. Accordingly, given the full and exhaustive record which was made

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* This Manheim concedes, although he fails to grasp its significance. On page 23 he says:

> "The City was, of course, the highest and only real bidder for the properties of the two companies on liquidation and, if it had not bid, all the security holders might well have fared worse * * *."

That the City was the only possible purchaser who was willing to pay anything approaching the total of the unification offers in order to acquire the Interborough-Manhattan transit properties is abundantly clear from the record and is one of the controlling facts in this case. This was recognized by Judge Swan when he said that (R., p. 961):

> "* * * it is obvious that every security holder is faring far better than ever would be the case but for the interest of the City."

before him, there can be no doubt of Judge Patterson's power to settle these claims.

(b) Manheim had no direct contractual right against Interborough. His sole hold on the claims was through his Mortgage Trustee; they were additional security under his mortgage. The claims, therefore, were property which the Second Mortgage Bondholders as a class were entitled to have dealt with for their benefit the same as any other property subject to the lien of their mortgage.

The Second Mortgage contained explicit provisions that a majority of the Bondholders could direct the taking of any action relative to enforcement of the security under that mortgage (R., Vol. IV, p. 961). Accordingly, pursuant to the direction of a majority of the Bonds (R., Vol. I, fol. 1351), the Trustee filed a petition (R., Vol. I, fol. 1327) which, after referring to the fact that the Manhattan physical properties were being sold upon foreclosure of the Consolidated Mortgage, and that the Court had entered an order on March 15, 1940 determining the amount to which Second Mortgage Bondholders should be entitled on their claims, alleged that foreclosure of the Second Mortgage would be futile and unnecessary, and prayed for the entry of a decree in accordance with the prayers of the petition. On June 10, 1940, the decree so prayed for was entered (R., Vol. II, fol. 1363). It provided as follows:

> (a) that the foreclosure of the Second Mortgage would be a futile and unnecessary act;
>
> (b) that the proceedings theretofore had leading up to the court's order of March 15th on the claims were tantamount to a foreclosure of the Second Mortgage on the claims against Interborough asserted in the proof of claim of the trustee of the Second Mortgage;

(c) that payment for the account of holders of Second Mortgage Bonds of the amount allowed on such claims should constitute a final determination of the rights of the trustee and of the holders of Second Mortgage Bonds; and

(d) that no further acts or proceedings were necessary for the enforcement of such rights.

Manheim was represented by his counsel at the hearings leading up to this decree, and his counsel participated in the argument on this matter. He was likewise represented in the seven days of hearings on the claims. It is clear that he has had his full day in Court and that his mortgage has been completely and properly enforced.

(c) Judge Patterson's decision is also supported by Rule 23 of the Rules of Civil Procedure, which provides, in part:

"(a) If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

* * * * * *

"(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

* * * * * *

"(c) A class action shall not be dismissed or compromised without the approval of the court."

Since we are dealing here with bondholders, the presence of the Trustee alone satisfied the requirement of adequate representation before the Court. However, as we have pointed out above, not only did the Trustee take part in the proceedings relative to the claims, but so did the representatives of a majority of the bonds, the Wassner Committee representing a minority of the Bonds, and Manheim himself. Moreover, the hearings were held upon notice to security holders both by mail and by publication.

Manheim's contention that Rule 23 was not properly invoked for the purpose of bringing a class action binding upon him is a contention which he is not in a position to make, since he participated in the proceedings. *Hansberry* v. *Lee*, 311 U. S. 32 (1940). In that case, this Court wrote (pp. 42-43):

> "It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or *where they actually participate in the conduct of the litigation in which members of the class are present as parties* * * *." (Italics inserted.)

**(4)**

Manheim makes one further assertion which is sprinkled throughout his brief and which has no support in fact: that is, that the non-assenting bonds were in a class separate from the assenting bonds for the purpose of settling the claims litigation. This is simply not the case. The assenters under the Plan were as vitally interested in the subject matter of the claims as were the non-assenters. It was essential to the assenters that the claims litigation be determined and definitely disposed of in a manner conso-

nant with accepted legal principles. The Plan, at the insistence of the City, required this in express terms.

Manheim can no more validly contend that he is a member of a separate class for the purposes of the claims litigation than he could have contended that he was a member of a separate class in the fixing of an upset price upon foreclosure of his Mortgage. In claiming to be in a separate class Manheim overlooks the fact that the Second Mortgage Bondholders all held bonds of an identical series, issued under the same Mortgage, and containing throughout identical terms and provisions. Such bondholders all looked to the same property, the same security and the same documents for the enforcement of their rights. They were clearly members of an identical class, and the mere fact that subjectively a minority of them analyzed their rights differently from the others could not alter their class membership.

We desire to point out once more that it would be impossible to make more completely informative the record on which the District Court acted. Manheim's sole hope is that by having this Court review the claims litigation, he will be afforded a new winnowing of this vast and complicated mass of factual data and a reinterpretation of the unique contracts and franchises pertaining to New York City's unique rapid transit system. Through such a reexamination, he hopes that the City of New York will have to pay him more than the liberal amount which he has refused to accept. But he points to nothing which would tend to support that hope.

## POINT III.

**No Questions of Public Interest or Importance Are Presented to Justify Granting the Petition. On the Contrary, This Case Presents a Situation Where It Is Abundantly Clear That the Court Should Not Exercise its Power to Grant a Writ.**

**(1)**

This case is *sui generis* if any case ever was. In the first place, the relationships between the City, Interborough, Manhattan, and the security holders of both companies stem from a most unusual and distinctive group of franchises, contracts and related certificates which were issued by the State of New York for the express purpose of regulating the relationships between those companies and the City. The Legislature set out in great detail the precise content of those documents, and they have repeatedly come before both the Federal and State Courts for construction. Their interpretation is not only a matter of State law, but is of interest to no one but the parties to this litigation. Moreover, as the properties of the two companies are now in public ownership and operation, and the franchises and contracts in question have now been terminated, no further questions can hereafter arise with respect to them.

In the second place, there is involved here the meaning and effect of language used in the 1903 lease by which Manhattan leased its lines to Interborough. That document is nothing more than a private contract respecting the unusual transit situation then existing in New York City. The interpretation of that lease is of no concern to anyone other than the litigants in this particular proceeding—especially as the lease has now been wiped out by

the consummation of the Unification Plan. Moreover, as we have already pointed out, the New York State Courts have more than once decided, adversely to Manheim, the question of whether, under this very lease, Manhattan's stockholders occupied the status of direct contractual creditors of Interborough.

In the third place, this case arises out of the consummation of a Unification Plan, prepared and adopted by an independent State agency pursuant to the specific provisions of the Public Service Law of the State of New York. This Court has said before that "federal courts of equity should exercise their discretionary powers with proper regard for the rightful independence of state governments in carrying out their domestic policy." *Pennsylvania* v. *Williams*, 294 U. S. 176, 185 (1935). That principle should be applied here, at least to the point of recognizing that no reason exists for reviewing a unanimous decision of the Circuit Court of Appeals holding that the State of New York has fairly and equitably carried out its purpose of reducing these transit properties to public ownership and control, and making adequate provision for those interested in them.

**(2)**

This case, with its highly unique facts, will come as close as possible to existing as a law unto itself. Chapter X and Section 77 of the Bankruptcy Act have absorbed almost all reorganization cases into their more advantageous statutory procedures. There is no likelihood, therefore, of widespread public interest in the legal effect of the decision of the instant case, which, as we have said, in any event arises out of a set of facts and circumstances which are peculiarly unique.

Apparently aware of the particularly restricted nature of the issues which he seeks to raise, Manheim has gone far afield in an effort to find situations to which their decision might be applicable. He purports to find such applicability in proceedings under Section 11 of the Public Utility Holding Company Act of 1935 and in proceedings under the Bankruptcy Act (Brief, p. 25).

There is no real similarity between this case and cases under those statutes. In the first place, the typical integration and simplification proceedings under Section 11 of the Holding Company Act have to do with solvent and even prosperous companies. No bankruptcy or receivership is normally involved. Manhattan, on the other hand, was hopelessly insolvent, and its securities had values which were supported almost solely by the incidental benefits which they derived from the City's franchise rights against Interborough—rights which the City stood ready to yield at any time if Manhattan proved unreasonable in the light of its precarious position. Moreover, as we have stated above, the questions which were presented in this case arose out of a unique series of inter-related documents which grew up with the City's rapid transit system and which never have been and never will be duplicated elsewhere.

Manheim ignores all these facts when he asserts that this litigation is important to proceedings under the Bankruptcy Act and the Holding Company Act. His point therefore is without merit.

**(3)**

It is true that transit unification was a matter which affected the welfare of all the citizens of the City of New York, as well as the security holders of Interborough and Manhattan. So important did the Legislature consider its

accomplishment, that it declared a public emergency to exist until it was accomplished. But these considerations have nothing to do with the present application. Its scope is extremely limited, and is of no public interest or importance whatsoever.

Manheim has made it clear that he has no desire to upset or to change the Unification Plan. He raises the single question of whether non-assenting holders of Second Mortgage Bonds are entitled to more than $394.68 in cash as their distributive share in Manhattan's assets. Thus the issue which he raises is one which concerns only himself and the few Bondholders whom he represents. And, furthermore, he adduces nothing by way of proof or analysis to show that $394.68 represents an inadequate and unfair valuation of Bonds which were junior to a mortgage which was in default to the extent of $44,244,000.

In reality, Manheim has only one cause for dissatisfaction, and for that he has only himself to thank. The City, in pursuance of its determination that it would separately negotiate with each class of security holders terms for the exchange of securities which would result in generous treatment for all, has offered Second Mortgage Bondholders more than they could have received through any other solution of the litigation. That offer, which was kept open for more than a year, Manheim was foolish enough to reject. Having made that decision, he must now abide by it. As Judge Swan said in the Circuit Court of Appeals (R., p. 958):

> "Hence, if the upset price represented a fair valuation, as we have shown that it did, and all security holders were given an adequate and equal opportunity to come in, as they were, we do not think a security holder who elected to take cash can com-

plain because the City was ready to pay a higher price to security holders who were willing to exchange their old securities for Corporate Stock."

## POINT IV.

**The petition should be denied.**

Dated, New York, January 12, 1942.

Respectfully submitted,

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The undersigned hereby join in the foregoing brief:

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# Appendix.

## UNIFICATION STATUTE

### Article VII, New York Public Service Law

§ 122. *Definitions.*

When used in this article, unless the context in relation to the subject-matter clearly indicates that another meaning is intended:

* * *

2. The word "commission," means the metropolitan division of the department of public service formerly known as the transit commission;

3. The word "board," means the board of transit control;†

* * *

6. The words "local authority," shall include the board of estimate and apportionment and any other analogous local authority in such city having control of streets or authority to make appropriations;

* * *

10. The word "plan" shall mean a plan and agreement of unification and readjustment made in accordance with the provisions of this article;

* * *

13. The word "may" is always to be construed as permissive in character, and not mandatory or directory, as to any action or function to which it is related in the text;

14. The word "shall" is always to be construed as mandatory except when used as a synonym for the word "will" indicating a future tense. * * *

§ 123. *Commission to prepare plan*

1. The commission after making the necessary studies and investigation shall prepare a plan or plans for the relief of the emergency which is hereby declared to exist, and for the improvement of transit in any such city. Such plan shall contain provisions which in the judgment of the commission, will accomplish as nearly

† The Unification Plan might have provided for the vesting of titles to the properties in a board of transit control, but this device was not included in the Plan. The definition of "board" is included above, however, because the board is referred to from time to time in the provisions of the statute which are here quoted.

as may be the following purposes: (1) the acquisition and unification, under public ownership or control, of railroads and other transit facilities, by purchase and direct conveyance or transfer, or by lease, recapture, assignment of lease, modification or extinguishment of existing contract or contracts, * * * or partly by one of such methods and partly by one or more of the others, so that service thereon may be increased, extended and improved to the fullest extent possible, (2) the receipt as soon as practicable by the city of net revenues from the operation of the railroads which will be applicable to the payment of interest and amortization charges on corporate stock or bonds of the city after deduction of all expenses of maintenance and operation, reserves for depreciation and otherwise, interest and amortization charges and other deductions as may be provided in a plan or in any contract or lease made in pursuance of its provisions, and (3) the assuring to the people of the city the continued operation of the railroads at the present or lowest possible fares consistent with their safe and economical operation and the performance by the board of its obligations under any plan and under any lease or contract made in pursuance of its provisions. * * *

2. * * * Without limiting the authority and discretion of the commission, it may consider the incorporation in the plan of provisions whereby the title to such railroads as are not already owned by the city and whose ownership thereby is deemed by the commission to be desirable may be vested in the city and whereby rights under existing contracts for the construction, equipment and operation of rapid transit railroads already owned by the city may be acquired by the city. * * * In the event of the incorporation of such provisions in the plan the commission shall outline an arrangement whereby outstanding securities of the railroad companies may be retired either by application of the amounts paid by the city for the railroads acquired or through the issue of bonds of the board, or in part by one method and in part by the other, and whereby such bonds or other securities may be amortized or otherwise paid. * * *

* * *

4. Valuations. In connection with the preparation of any plan the commission shall cause a valuation or valuations to be made of the railroads, properties and interests therein, including leases and leasehold interests and outstanding contracts the assignment to or cancellation of which by the city may be deemed advisable but excluding franchises and going value, of the railroad company or railroad companies it proposes to include therein. Any such valuation including the value of contracts acquired may be in such detail and include such elements of cost or value and be made in such manner as the commission may from time to time determine and prescribe, with due regard to the past, present and estimated prospective earnings of such railroads, properties and interests at the rate or rates of fare that the railroad company or railroad com-

panies prior to the taking effect of this act were entitled to charge under the provisions of the contracts or franchises under which such properties are operated or held or of any lawful order then in force fixing or regulating rates of fare, or under existing law, and in view of the competition of other lines and with due regard to all other pertinent facts and conditions; but such valuation shall not in any case exceed the fair reproduction cost of such properties less depreciation, and, in the case of leasehold interests and contracts to be assigned, acquired or cancelled, the fair value of any such leaseholds and contracts. Any such valuation as finally determined by the commission may be the basis for the inclusion of such railroads, properties, contracts and interests in the plan and for fixing the allowances and returns on account thereof under the plan and under any leases or contracts made in pursuance of its provisions.

* * *

6. Board of transit control. Rapid transit railroads and other transit facilities, as defined in section one hundred and twenty-two hereof, being a part of the public streets and highways necessary for the convenience, health and welfare of the public at large and essential for the protection of the state in time of emergency, are and are hereby declared to be matters of state interest and concern. * * *

* * *

10. Body politic and corporate. The board when organized shall be a non-profit sharing body politic and corporate instrumentality for the purpose of engaging in an essential governmental function, * * * and its purposes are and are hereby declared to be essential to the public welfare and interests of the state. * * *

* * *

§ 124. *Procedure under plan*

1. Upon the completion of such plan, but before finally adopting the same, the commission shall hold a public hearing thereon at which citizens shall be entitled to appear and be heard and shall transmit a copy thereof to the local authority of the city and to each of the railroad companies which owns, leases or operates any of the railroads included therein, with a request for the statement of the views of such local authority and such railroad companies thereon. Such local authority and such railroad company or railroad companies may transmit such views and be heard thereon within a period of time to be prescribed by the commission. Thereafter the commission from time to time may make such changes in or modifications of such plan as the commission in its discretion may deem to be advisable.

The commission shall then formally adopt the plan and call upon each of the railroad companies which owns, leases or operates any of the railroads included therein or whose leasehold, contract

or other interests are to be acquired to inform it within a period of time to be fixed by the commission whether it accepts such plan.

Any such plan as formally adopted by the commission may provide that the commission, with the approval of the local authority, shall determine from time to time whether and when a sufficient amount of the securities to be adjusted have been deposited under or have otherwise assented to the plan to render it advisable to declare the plan operative, and in such latter event the plan shall not be or become operative until so declared by the commission with the approval of the local authority. If the railroad companies or one or more of them do so accept, or if in the judgment of the commission a sufficient number of them so accept as to justify carrying out the plan, and if the local authority also approves the plan, and the plan is or is declared operative in accordance with its terms, the local authority shall take all such action or actions as may be necessary or convenient to carry out the plan. All deeds, assignments or surrenders of leaseholds and contracts and other interests, leases, mortgages, contracts and other documents shall be approved by the commission.

* * *

9. Consummation of plan. After the approval of such plan, as provided in this section, and thereupon, if the plan is or is declared to be operative in accordance with its terms, the local authority may consummate the transaction by the execution and delivery of the deeds of conveyance and instruments of transfer, lease or leases, mortgage or mortgages, contracts and all other instruments and documents, necessary or advisable for carrying the plan into effect which shall be approved by the commission.

* * *

12. Securities acquired by city. If, pursuant to a plan, the city shall become the owner or holder of securities of a corporation owning the railroads to be acquired under the plan, or the securities of a corporation holding the securities of such owning corporation, or securities to which such railroads are subject, such securities shall be delivered into the custody of the comptroller of the city. The city, acting by the local authority or by such person or persons as the local authority may designate, may exercise such powers with respect to such securities as might any other holder hereof. * * *

§ 125.

* * *

4. Issue of corporate stock or serial bonds. (a) The local authority is authorized and empowered from time to time to authorize the issuance of corporate stock or serial bonds of the city for the acquisition of railroads, or any portion thereof, including the acquisition of facilities and properties used in connection therewith, rights therein, securities of corporations owning such

railroads, facilities, properties or rights, securities of corporations holding the securities of such owning corporations and securities to which such railroads, facilities, properties or rights are subject, whether or not including the acquisition of land in connection therewith, which shall be included in a plan and the title to which shall be vested in the city as provided in this article * * *.

* * *

5. Expenses in formulating plan. The local authority is further empowered to authorize the issuance and sale of tax notes, corporate stock or serial bonds and to use the proceeds thereof for the payment of expenses necessarily incurred by the city, the commission or the board in the preparation, adoption and execution of a plan, including the preparation of the mortgages, bonds and other documents and the securing of consents and approvals of security holders and otherwise, the expenses of the commission to be paid upon the requisition and certificate of the chairman or acting chairman of the commission. * * *

* * *

§ 129. *Approval of contracts to effectuate plans*

Anything contained in this article to the contrary notwithstanding, neither the commission nor the board shall execute and deliver any plan, or any lease or leases thereunder, without obtaining the consent and approval of the local authority of such city. * * *

(12)

Supreme Court, U. S.
FILED
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IN THE

# Supreme Court of the United States

**October Term, 1941**

No. 806

PAUL E. MANHEIM, as a Committee, and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee,
*Petitioners,*

*against*

VAN S. MERLE-SMITH, *et al.*, J. P. MORGAN, *et al.* and J. HERBERT CASE, *et al.*, Contracting Committees, The City of New York, the Transit Commission and all other parties to Plan and Agreement to end the receivership of Interborough and Manhattan Companies, Thomas E. Murray, as Interborough Receiver, and William Roberts, Receiver of Manhattan Railway Company,
*Respondents.*

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

LOUIS CONNICK
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CARLOS L. ISRAELS
*on the Brief*

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IN THE

# Supreme Court of the United States

**October Term, 1941**

No. 806

PAUL E. MANHEIM, as a Committee, and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee,
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*Respondents.*

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### Preliminary Statement.

Paul E. Manheim, on his own behalf and on behalf of the owners of the bonds represented by him (hereinafter sometimes called "petitioners") has adopted the somewhat unusual procedure of filing a reply brief as permitted by Rule XXXVIII because the brief in opposition, filed on behalf of the City of New York and others, reveals a fundamental difference of approach to the problems presented by this case.

Our opponents' argument is based upon two premises:

*First:* That this is a conventional reorganization case, from which they argue that the Unification Plan meets the standards of this Court's decisions in *Case* v. *Los Angeles Lumber Products Co., Ltd.*, 308 U. S. 106, and *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510.

*Second:* That all holders of Manhattan Second Mortgage Bonds are members of a single class of creditors of Interborough, from which they argue that the consent of Curtis, Belknap & Webb, attorneys for the Rockefeller interests, holding approximately 60% of the issue, as well as various other securities of Interborough and Manhattan, is binding upon all.

For the purposes of this reply brief we shall accept these premises, upon which the decision of the Circuit Court of Appeals in this case stands for two propositions:

1. Where an outsider offers to purchase the assets of a receivership estate, that purchaser may dictate the manner in which the price he proposes to pay shall be distributed among the claimants against the estate, and the Court may approve such allocation, though it violate the rule of absolute priorities between creditors and stockholders, as set forth in decisions of this Court.

2. All of the members of a class may be bound to a compromise of the legal rights of that class by the consent of members not purporting to act for others, and concededly having conflicting interests.

We think it clear that under applicable decisions of this Court, these propositions are untenable, and sanction a procedure by which the District Court so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

## POINT I.

### The Plan is Demonstrably Unfair.

The Unification Plan and the fairness of the offers thereby made to all security holders, including Petitioners and all other holders of Manhattan Second Mortgage Bonds, was submitted to and passed upon by the District

Court. On March 15, 1940, the District Court, after hearing, entered its order (R. 419) in which it found, ordered, adjudged and decreed that the Unification Plan "is fair, equitable and feasible, and the offers made in the Plan to creditors and stockholders of Interborough Rapid Transit Company and of Manhattan Railway Company, are fair, equitable and timely." On June 12, 1940, the District Court signed orders confirming the sales of the Interborough and Manhattan properties to the Contracting Committees, "acting pursuant to the Plan" (R. 241, 243; 273, 277), and an order "authorizing and directing consummation of the plan," (R. 456) all referring to its finding "the Plan to be fair, equitable and feasible and the offers made therein to creditors and stockholders of Interborough and Manhattan fair, equitable and timely." Petitioners appealed from each of these orders and from each and every part thereof (R. 19, 20, 25, 26). These were among the orders affirmed by the Circuit Court of Appeals.

Our opponents' brief stresses at many points the contention that Petitioners' position is purely that of creditors of Interborough. Again, for purposes of this reply brief, we shall accept the premise. Upon it, a single illustration will suffice to make our point. Nowhere in this Record does there appear any determination of the amount of the claims of Manhattan parties as Interborough creditors, against which the adequacy of the offers made to them in the Plan could be appraised. Yet the holders of 350,000 shares of Interborough Common received $3 a share, a total of $1,050,000 (R. 98, 154, 155).

The Record indicates some slight confusion as to precisely where responsibility rests for the Interborough stockholders' participation under the Plan. Our opponents' brief, (p. 13) interprets the Plan as "a series of offers by an outside purchaser to the holders of Interborough and Manhattan securities" and quotes (p. 5) from the opinion of Judge Swan as follows:

> "The Record reveals that the City desired not only to acquire the property but also to satisfy security holders without eliminating any class. . . ."

The opinion of the District Court (R. 408) states:

> "But the primary distinction here is that the money to be paid to the stockholders comes from an outside purchaser, the City, which does not pay a lump sum into court to be fought over by those with claims, but which makes the price divisible into portions for the various classes of claimants on a basis that, for practical purposes, is quite clearly a fair one."

On the other hand, counsel for the Transit Commission stated to the District Court (R. 580-581):

> "Of course, from the point of view of the City, the purchaser, or the Transit Commission, the State organization that has to act as the check and balance on the City, it is quite immaterial who gets the portions or any particular portions of the purchase price. It is the purchase price that is important from the point of view of the City."

With particular respect to the participation of Interborough stockholders, the District Court's opinion reads (R. 409):

> "It was stated at the hearings that the inclusion of a small amount for stock was insisted upon by counsel for the Transit Commission because it was felt that there was a value in the stock, however small."

Regardless of where the responsibility for the Interborough stockholders' participation may rest, the opinion of the District Court seeks to sustain it upon the authority of the *Los Angeles* case, stating:

> "The tender of $3 per share to stockholders is by way of compromise, . . . The opinion in the *Los Angeles* case, *supra*, made mention that settlement of disputed claims by compromise rather than by protracted litigation is proper and reasonable" (R. 408).

The opinion continues, however, to justify the "compromise" as follows:

> "In case the present plan and agreement were to be disapproved on the score of stockholder participation, there is every likelihood that it would be amended so as to drop out the stockholder participation without corresponding advantage to any class of creditors but with the disadvantage of further delay and uncertainty" (R. 409).

This language is strangely reminiscent of the argument of the proponents of the *Los Angeles Lumber Products* plan, which this Court disposed of as follows (308 U. S. 106, 129):

> "The conclusion of the District Court that avoidance of litigation with the stockholders gave validity to their claim for recognition in the plan involves a misconception of the duties and responsibilities of the Court in these proceedings. Whatever might be the strategic or nuisance value of such parties outside of § 77B, is irrelevant to the duties of the Court in confirming or disapproving a plan under that section. In these proceedings there is no occasion for the court to yield to such pressures. If the priorities of creditors which the law protects are not to be diluted, it is the clear duty of the Court to resist all such assertions."

It is submitted that if "there was a value in the stock, however small" the District Court has held that the Interborough receivership estate was of sufficient value to sustain a payment in full of all Interborough creditors, (including by hypothesis, Petitioners) and leave a balance for the stock. Yet upon this Record, neither Manhattan claimants nor the Court could judge whether or not the offers made were or were not full payment.

Clearly the criterion of fairness established by this Court's decisions in *Northern Pacific Railway* v. *Boyd*, 228 U. S., 482, and in the *Los Angeles Lumber* and *Consolidated Rock Products* cases is not met. That criterion

> "does not . . . require the impossible and make it necessary to pay an unsecured creditor in cash . . . If he declines a fair offer . . . having refused to come into a just reorganization, (he) could not, thereafter be heard in a Court of Equity to attack it." (228 U. S. 482, 508.)

The *Los Angeles* and *Consolidated Rock Products* cases clearly set forth the requisites of a fair offer. They make clear that the creditor must be offered cash or new securities, having at least a potential value equivalent to the full amount of his claim plus interest, before stockholders can receive anything except for new money or money's worth.

In *Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307, the *Los Angeles* and *Consolidated Rock Products* cases, this Court rejected plans of reorganization based upon compromises, not because they were compromises but because the issues compromised were, in its judgment, not "close questions of interpretations of after acquired property clauses in mortgages, preferences in stock certificates, divisional mortgages and the like . . ." which might "give rise to honest doubts as to which security holders have first claim to certain assets." (308 U. S. 106, 130.)

If there was any value in the Interborough stock, Interborough must have had sufficient assets to pay its creditors in full. In the circumstances, the District Court in the exercise of the "informed, independent judgment," required by this Court's decisions in *National Surety Co.* v. *Coriell*, 289 U. S. 426 and the subsequent reorganization cases, had at least the duty of determining what would constitute full payment of Manhattan parties' claims against Interborough.

This it did not do—unless the "Settlement Fund Order" of March 15, 1940, based upon the so-called "compromise" of non-assenters' rights accomplished it. We submit that it did not. (*Infra*, Point II.)

We have quoted (*supra*, p. 4), Judge PATTERSON's opinion as to "the primary distinction" that the City "makes the price divisible into portions for the various classes of claimants." Judge SWAN's opinion is equally plain:

> "The City's offer was made to satisfy security holders as well as to secure the properties, and having done so so successfully we will not disturb the Plan on the ground that different offers should have been made" (R. 961).

This proposition is of sweeping application, far beyond the particular facts of this case. It clearly belies our opponents' statement (Brief, p. 37): "This case is *sui generis* if any case ever was." The mere fact that the purchaser, in this case, was the City of New York will not prevent reliance upon the opinions as authority in any reorganization proceeding or in proceedings under § 11(b)(2) of the Public Utility Holding Company Act of 1935, where the tribunal must determine the fairness, equity and feasibility of plans of reorganization or recapitalization. Unless this decision be corrected, the argument can and will be made that while the preponderance of security holder support of a particular plan cannot, under the applicable decisions of this Court, relieve the tribunal of its duty of exercising an "informed, independent judgment" it lies within the power of a proposed purchaser to require the tribunal to abdicate that function.

## POINT II.

### The "Compromise" Must Fall for Want of Consent.

Having, justifiably we submit, rejected an unfair offer of participation under the Plan, Petitioners were called upon to and did participate in the so-called class action, in which the rights of non-assenting claimants against the estates were "compromised".

Our opponents argue (Brief p. 27):

> "Moreover, the Second Mortgage Bonds were fully represented before the Court, not only by counsel for Petitioner Manheim, but also by Chase Bank as Trustee of the Manhattan Second Mortgage, by Curtis, Belknap & Webb, representing a majority of the Second Mortgage Bonds, and by the Wassner Committee, for such bonds, all of whom participated actively in the hearings."

This "representation", our opponents argue, constitutes "the adequate representation of all" required by Rule 23 of the Rules of Civil Procedure. For purposes of litigation this may be so. But there was no litigation. There was a "settlement" by "compromise", approved by the District Court upon the consent among Manhattan Second bondholders, only of Curtis, Belknap & Webb. That firm appeared as attorneys for holders of 60% of the Manhattan Second Mortgage Bonds, and repeatedly denied acting in a fiduciary or representative capacity (R. 91, 146, 454, 593). Their clients had assented to the Plan. It was necessary for the Plan to be consummated that the "compromise" be railroaded through on a basis acceptable, not to non-assenters, but to the Contracting Committees (our opponents' brief, p. 32; R. pp. 110 *et seq.*). The District Court's "settlement fund order", dated March 15, 1940, (R. 410) provided that it should be null and void "in the event that the Plan should not be consummated" (R. 418).

The "compromise", therefore, can be justified as to Petitioners only upon the theory that all Manhattan Second Mortgage bondholders were members of a single class, whether or not they assented to the Plan, and that Curtis, Belknap & Webb could give consent for all the members of that class.

Again, for purposes of this reply brief, we shall adopt our opponents' premise. The Plan required as a condition to its consummation the consent of the holders of 66⅔% of the outstanding Manhattan Second Mortgage Bonds (R. 130). Curtis, Belknap & Webb concededly appeared as attorneys for the holders of 60% of the Manhattan Second Mortgage Bonds. But their clients also held substantial amounts of Interborough and Manhattan First Mortgage Bonds (R. 316). In that position, they could not, even had they so desired, validly give consent for any other Manhattan Second Mortgage bondholder. *American United Mutual Life Insurance Company* v. *City of Avon Park, Fla.*, 311 U. S. 138.

It is respectfully submitted that it was not the intention of this Court to sanction such procedure by its approval, in the *Los Angeles* and *Consolidated Rock Products* cases, of the practice of compromising difficult issues in reorganization.

## POINT III.

### The Status of Petitioners.

Our opponents apparently seek to create the impression that Petitioners are disappointed gamblers. Their brief (p. 14) refers to the price at which Manhattan Second Mortgage Bonds had sold on the New York Stock Exchange for some years prior to the adoption of the Plan, and states in a footnote:

> "The Record does not disclose when, or at what prices the bonds represented by Manheim were purchased, . . ."

The Record does not disclose that such information was ever asked for. Nor is this a bankruptcy proceeding, to which Section 211 of the Bankruptcy Act is applicable. Our opponents carefully avoid a charge that Petitioner

Manheim's own bonds were purchased at the prices referred to in their brief. Such is not the fact, to our opponents' knowledge.

Our opponents also emphasize the statement in the opinion of the Circuit Court of Appeals (R. p. 955):

> "He (Manheim) asserts no wish to upset the transfer of the properties to the City or to change the participation of assenting security holders. . ."

from which Judge SWAN drew the inference that the scope of Petitioners' appeal was limited to attacking the treatment of non-assenters.

Petitioners' position in this reply brief is directly analogous to that of the First National Bank of Cincinnati in *First National Bank* v. *Flershem*, 290 U. S. 504. To sum it up:

1. Petitioners were entitled to a fair offer of participation under the Plan;
2. Not having received such an offer, they were entitled to reject the offer made, and to receive instead the amount they would have got upon a proper distribution of the proceeds of the sale.
3. A favorable result upon Petitioners' appeal under equity procedures need not necessarily involve changing the participations of assenting security holders. Such was the result in the *Flershem* case. Such is the result here sought.

## Conclusion.

We think we have amply demonstrated, upon premises put forward by our opponents:

> That, considered as a reorganization case, the opinion of the Circuit Court of Appeals stands for a pro-

position clearly untenable under applicable decisions of this Court;

That the so-called compromise of non-assenters' rights was arrived at by a procedure so unusual and so prejudicial as to call for the exercise of this Court's power of supervision;

That the questions here involved are of wide public interest and importance.

A writ of certiorari to the Circuit Court of Appeals for the Second Circuit should be granted.

Dated: New York, January 21, 1942.

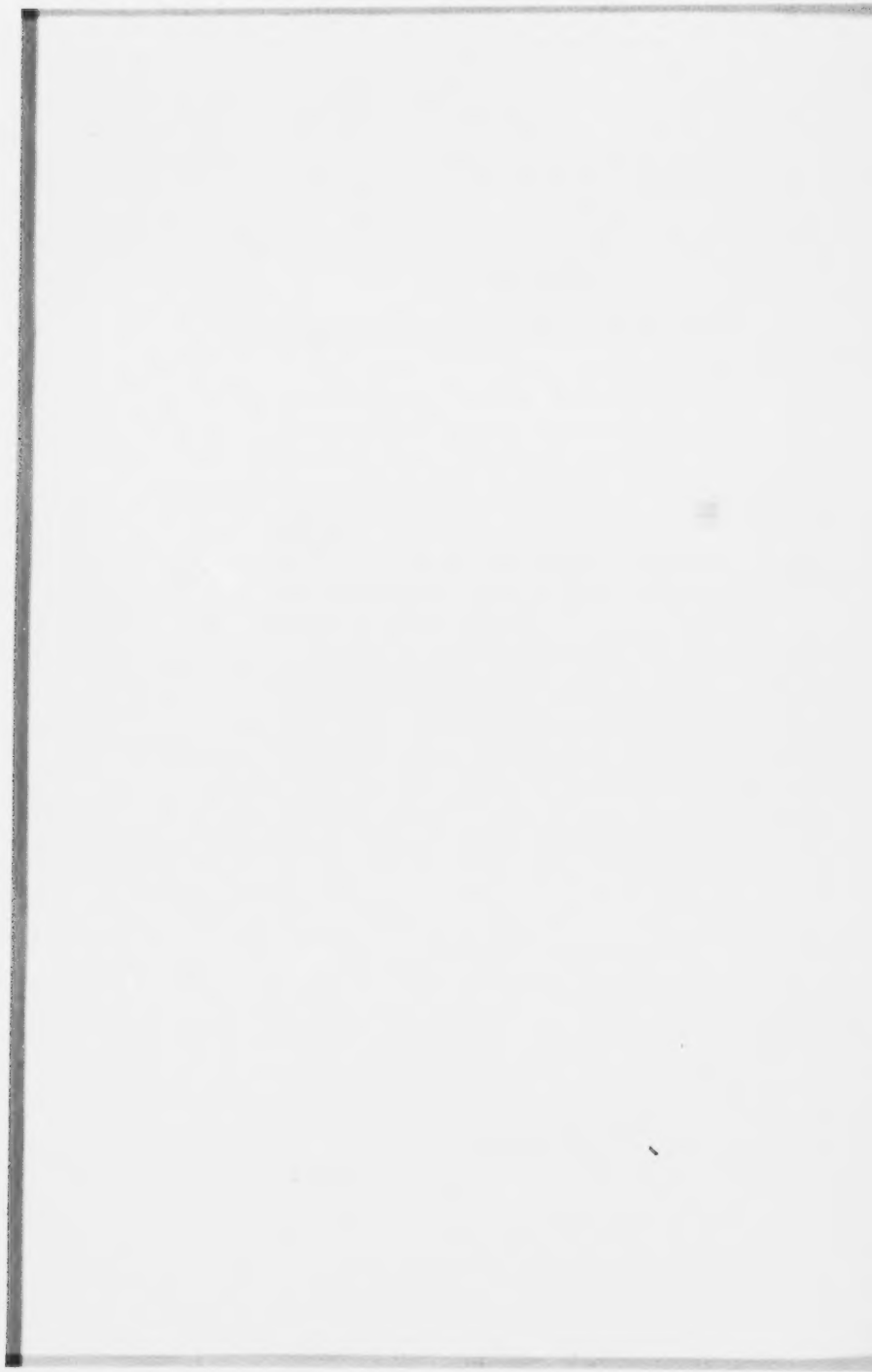
Respectfully submitted,

LOUIS CONNICK
*Counsel for Petitioner Manheim*

CARLOS L. ISRAELS
*on the Brief*

For the reasons more fully set forth on pages 28 and 29 of the Petition for Writ of Certiorari, the undersigned, Counsel for Petitioner The Chase National Bank of the City of New York, as successor Trustee under the Mortgage under which the bonds owned or represented by Paul E. Manheim are outstanding, adopts the foregoing brief for the sole purpose of protecting the rights, if any, of Paul E. Manheim and of the holders of said bonds.

HUGH L. M. COLE
*Counsel for Petitioner*
*The Chase National Bank of the*
*City of New York*



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# Supreme Court of the United States

October Term.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
*Plaintiff,*

*against*

INTERBOROUGH RAPID TRANSIT COMPANY,
*Defendant.*

---

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee,
*Plaintiff,*

*against*

MANHATTAN RAILWAY COMPANY, *et al.*,
*Defendants.*

---

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *et al.*,
*Plaintiffs,*

*against*

INTERBOROUGH RAPID TRANSIT COMPANY, *et al.*,
*Defendants.*

---

SOLOMON G. SALOMON, for himself,
*Appellant,*

*against*

VAN S. MERLE-SMITH, *et al.*, J. P. MORGAN, *et al.* and J. HERBERT CASE, *et al.*, Contracting Committees, THE CITY OF NEW YORK, the TRANSIT COMMISSION and all other parties to Plan and Agreement to end the receivership of Interborough and Manhattan Companies, THOMAS E. MURRAY, as Interborough Receiver, and WILLIAM ROBERTS, Receiver of Manhattan Railway Company,
*Appellees.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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SOLOMON G. SALOMON, *pro se,*
18 Pine Street,
Woodmere, N. Y.

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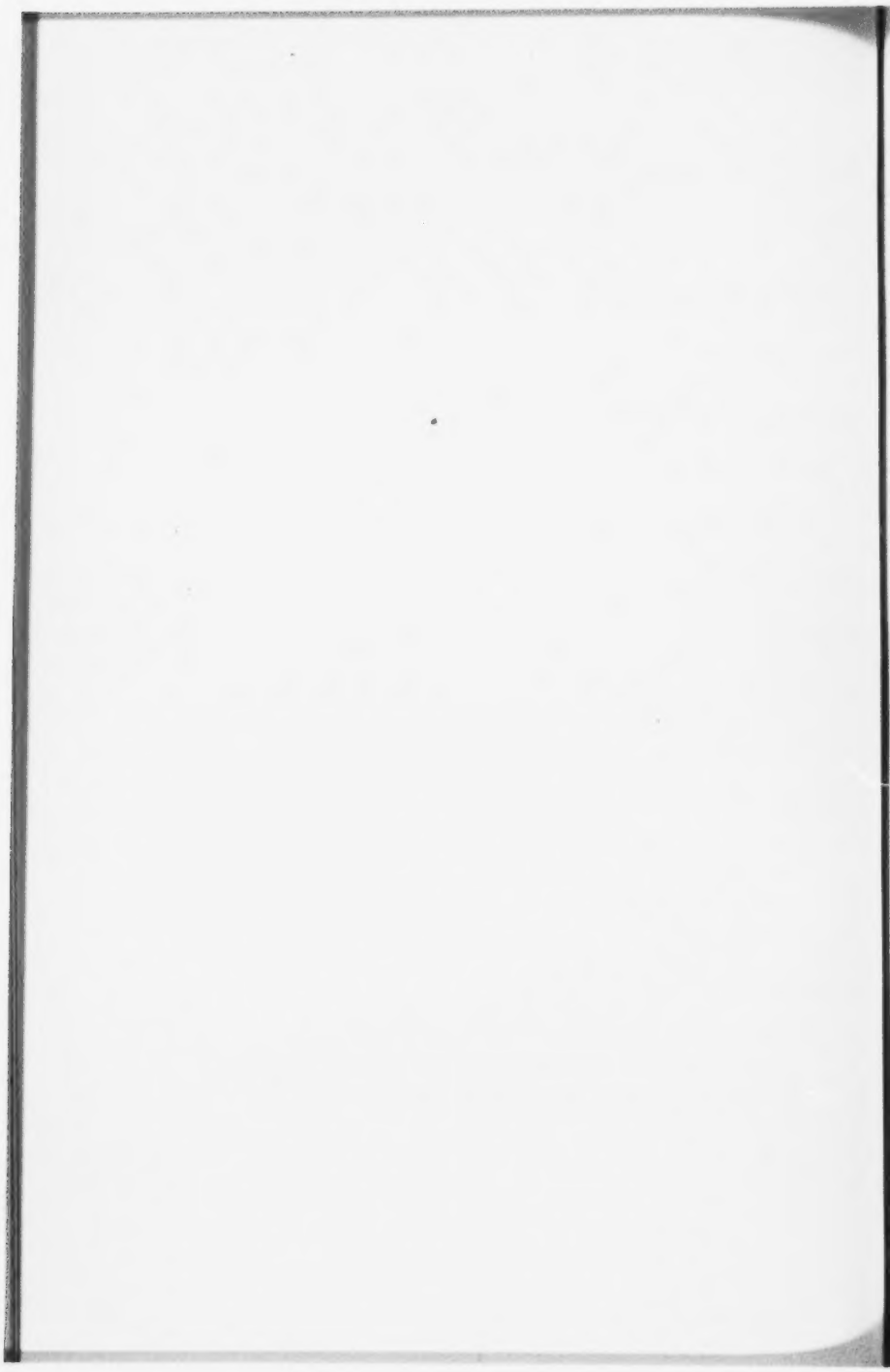

# Supreme Court of the United States

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CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee,
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*against*

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*Defendants.*

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THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *et al.*,
*Plaintiffs,*

*against*

INTERBOROUGH RAPID TRANSIT COMPANY, *et al.*,
*Defendants.*

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SOLOMON G. SALOMON, for himself,
*Appellant,*

*against*

VAN S. MERLE-SMITH, *et al.*, J. P. MORGAN, *et al.* and J. HERBERT CASE, *et al.*, Contracting Committees, THE CITY OF NEW YORK, the TRANSIT COMMISSION and all other parties to Plan and Agreement to end the receivership of Interborough and Manhattan Companies, THOMAS E. MURRAY, as Interborough Receiver, and WILLIAM ROBERTS, Receiver of Manhattan Railway Company,
*Appellees.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

I, Solomon G. Salomon, respectfully petition for a writ of certiorari to review the opinion and decision No. 317—

October Term—1940 (pp. 2003-17)—of the United States Circuit Court of Appeals for the Second Circuit, entered as its final decree and filed September 23, 1941, (hereinafter called Opinion 317). Therein the Circuit Court adversely disposed of my appeals from the preparatory decree of Judge Robert P. Patterson, Circuit Judge, acting as District Judge in the District Court for the Southern District of New York, entered March 15, 1940, wherein he recorded that he believed a certain Plan and Agreement to be fair, equitable and timely; and from Judge Patterson's orders entered on June 12, 1940, confirming and converting into final orders, certain other preparatory decrees, issued for the purpose of preparing the way for said decree of March 15, 1940; and from his finishing order, ordering that said Plan and Agreement be effectuated, because fair, equitable and feasible.

The various preparatory decrees, in the chronological order of issuance, are:

1—The decree of foreclosure and sale of certain Manhattan Railway Property, December 11, 1939, (R., Vol. I, pp. 187-241);

2—The decree of foreclosure and sale of certain Interborough Rapid Transit Property, February 5, 1940, (R., Vol. II, p. 525);

3—The decree dated March 15, 1940, (a), declaring the amount of $18,000,000 represents a fair compromise of the claims and counter-claims set forth in a document called "Analysis etc.", (R., Vol. II, p. 919, item (70)), and fixing said amount to be due to Manhattan and its security holders from Interborough Rapid Transit Company and

holders of its securities; and (b), declaring said $18,000,000 should be diverted and constitute a "Settlement Fund" for distribution, pro rata, to non-assenting holders of Manhattan securities of the designated kinds, in the respective amounts set forth in the Order dated March 15, 1940, (R., Vol. I, pp. 410-18), in the event that the Plan and Agreement should be effectuated according to the provisions of Article Two (2) and Article Five (3) thereof;

4—The decree declaring the Plan and Agreement dated March 15, 1940, (R., Vol. I, p. 419), to be fair, equitable and timely.

The final orders issued on June 12, 1940 are:

A—The order confirming the preparatory sale in the receivership, of certain Manhattan-owned assets to Merle-Smith, *et al.*, (R., Vol. I, pp. 241-71); for the purpose of transferring title to same to the City, and the transfer thereof to the City, (R., Vol. II, pp. 536-61);

B—The order confirming the preparatory sale in the receivership, of certain Interborough-owned assets to J. P. Morgan, *et al.*, (R., Vol. I, pp. 273-304); and the transfer thereof to the City, (R., Vol. II, pp. 524-35);

C—The Order Authorizing and Directing Consummation of the "Interborough-Manhattan Unification Plan", (R., Vol. II, pp. 456-523).

## Statement of Facts

The facts, in barest outline, are:

### A

The City of New York offered to purchase majorities of ⅔ or more of the shares of Manhattan Railway

Company's capital stock and Second Mortgage bonds and 76% or more of its Consolidated Mortgage bonds, (hereinafter called First Mortgage), same being the only classes of outstanding securities of said Company; and to purchase 76% each of Interborough bonds and 7% notes but not any of the Interborough capital stock or 6% notes, (the only other existing classes of Interborough securities), because, *prima facie,* the latter two were worthless in the existing circumstances of the Interborough Estate; *i.e.*— the Estate being legally bound to keep the Manhattan lease, and legally bound to furnish the existing service of through transportation at 5¢, even to the exhaustion of the investments of the co-adventurers Interborough bondholders, as well as of the investments of the holders of its stock and 6% notes, (*Murray* v. *Roberts,* 103 F. 2d. 889, 893).

**B**

The City, through its authorized officials, made said offer in Section II, Article Seven of the Plan and Agreement, (*supra*), on August 31, 1939. The Committees, and the representatives of the Rockefeller Interests, all of whom signed the verbose published Plan and Agreement, (R., Vol. I, pp. 60-155), (hereinafter called Plan), bound themselves to continue to represent the respective classes of securities in the Receivership Proceedings, if the City actually acquired the ownership of the amounts of said five classes of securities set forth above, or more, (which it did on November 22, 1939, see Exhibit A, Vol. I, pp. 385-87). This continued representation furnished the City many mouths in the Receivership Proceedings, whereas

lawfully it had only two, the Corporation Counsel and the Special Counsel for the Transit Commission. Through these mouths and the mouths of the then Assenting Committees, (and later the mouths of assenters who signed after August 31, 1939), many self-serving words were spoken. This plethora of words served to obscure the few simple and proper words uttered by Mr. Gutman and myself on March 6, 1940, wherein we expressed the apparent objections to, and the objectionable features of, the Plan. Same appear on pages 879-887, in Volume II of the Record on Appeal.

**C**

The Opinion in *Manhattan Ry. Co.* v. *Central Hanover Bank & T. Co.*, (99 F. 2d 789), shows I appeared therein, and that I was already calling Section 24 of the Rapid Transit Act of this State to the attention of the Federal Courts and all Manhattan parties admitted to intervention in the receivership. Thereby, I showed them Interborough Receivers could not ever have any lawful right to disaffirm the Manhattan lease, because Interborough's franchises to operate its elevated railroad routes, were granted under Section 24 of said Act, and same is "the law of the case" of disaffirmance.

I asked to be heard at that time under the principle expressed in Rule 24 (a)—(2) and (3) of the Federal Rules of Civil Procedure. I did not rely on Section 24-a of the Rapid Transit Act which relates to "Relocation of a railroad or portion thereof", as mis-stated in the opinion therein.

The Opinion, in 99 F. 2d. 789, merely held that some day there would be a decision which would determine the

existence or non-existence of any right to disaffirm the Manhattan lease. The effect of applying "the law of the case" would have been an automatic determination that the District Court had no right to allow a partial foreclosure of the Manhattan First Mortgage in 1938. Now, the District Court has presumed to ignore "the law of the case" and to permit a complete and final foreclosure of the mortgage, for the sole purpose of effectuating this Plan, (Article Two (2) thereof), rather than make good or compensate the results of its own errors. Absent said errors, there could not be any such foreclosure. It is clear that, in 1938, the Circuit Court avoided prompt determination of the two most important matters involved in the receivership, contrary to the established principles of justice, which were incorporated in the second sentence of Rule 1 of the Federal Rules of Civil Procedure, submitted to Congress before January 17, 1938 and thereupon duly approved and given the force of law.

**D**

Following the Opinion of Judge Patterson, dated June 16, 1938, (R., Vol. II, p. 937, item (151)), in an effort to obtain just, speedy, and inexpensive determination of the disaffirmance matter, as it should be determined pursuant to Section 24 of the Rapid Transit Act, I petitioned, via Manhattan Receiver, for reargument, (R., Vol. II, p. 938, item (152)). The petition sets forth that, if there had been an application to disaffirm the March 15, 1913 Agreement between Manhattan and Interborough, and to disaffirm the certificate for the additional tracks, (often called Third Track Certificate), the ensuing briefs and

arguments would have revealed that disaffirmance of the Manhattan lease could not be allowed because Interborough was, in fact, tied to the Manhattan lines by other instruments in addition to the Manhattan lease, (see division *"Second"*, item (151), *supra*).

The petition also sets forth that the March 15th Agreement, the Third Track Certificate and the Extension Certificate constituted an integral transaction. In *Murray* v. *Roberts*, (103 F. 2d, 889, 894), the Circuit Court decided that the Third Track Certificate and the Extension Certificate are indissolubly united. In the same Opinion, (p. 897), the Circuit Court decided that Mr. Murray must continue to keep possession of the tracks authorized by the Third Track Certificate and must exploit them sufficiently to comply with the Certificate.

On page 20 of my main brief below, I said:

> "Judge Patterson did not hold that the language of Section 24, paragraph 3 of the Rapid Transit Act, hereinbefore quoted under FUNDAMENTAL FACTS, is obscure or that, because of context, any other meaning can be given to said language than that Interborough was bound to operate such spans on a Manhattan-owned line and the original line as a unit. Neither has this Court so held."

And this Court said in *Edwards* v. *Kearzey*, (96 U. S. 595, 601), "the laws which subsist at the time and place of making a contract enter into it and form a part of it, as if they were expressly referred to or incorporated in its terms". Judge Patterson himself could have decided, long before April 17, 1939, that he had been in error, thus avoiding about $7,100 costs to the Interborough Estate and

enormous allowances to attorneys and others for argument of a matter which, in good faith and good sense, could have been summarily disposed of at any time during the receivership without bleeding the Estate.

**E**

The Circuit Court did not deny the correctness of the meaning I attribute to Section 24, paragraph 3 of the Rapid Transit Act, quoted in FUNDAMENTAL FACTS,—*i.e.*, the provision which provides that the grantee of such franchises would construct an extension of, or any additional tracks on the supporting structure of, its lines, (as the case might be), with like effect as though the same were part of the original route of the line to which added.

It failed to consider or reject the evidence in Interborough Receivers' Application No. 17, (R., Vol. II, p. 927, item (135)), and Manhattan Receiver's Application No. 5, (R., Vol. II, p. 928, item (136)), showing that the issue of right to disaffirm the Manhattan lease arose and was joined at the outset of the receivership.

The Circuit Court ignored the fact that the natural product of "the law of the case" in Section 24, paragraph 3, if applied to said Applications of the three Receivers, was, (and is), the possibility for Judge Manton to have summarily disposed of the disingenuous asserted right to disaffirm the Manhattan lease, except that thereby, he would have deprived "eminent counsel" of the pap they thrive on.

**F**

The Circuit Court ignored: (1)—the three "Fundamental Factors" set forth on pages 28-33 of my main brief

below; (2)—the reference to Judge Manton and the successive attorneys appointed by him as Counsels to Receivers Dowling and Murray (Main Brief, p. 17); and, (3)—the reference to the possibility of purposeful bungling of the administration of the Interborough Estate, and of the trusteeship of the solvent Manhattan Company's affairs, by Judge Manton and his Receivers, (Main Brief, p. 34); and failed to consider whether the imputed bungling was culpable neglect, regardless of whether designed or careless.

**G**

The Circuit Court chose to ignore my substantiated allegations in totum and to believe the untrue items, (numbered 1-19), categorically enumerated in my Reply Brief, and duly corrected therein; including the misstatement of the Law of New York on which Respondents relied and rely to show the Plan was legal, even if not just.

**H**

The Circuit Court chose to ascribe unsubstantiated wisdom to their associate, Judge Patterson, and to disparage my ability to understand, (Opinion 317, p. 2017), though they were compelled to agree with my view of the Third Track Certificate, in *Murray* v. *Roberts,* (*supra*), set forth in Manhattan Receiver's Application No. 33, (*supra*), although same was rejected by Judge Patterson, (R., Vol. II, p. 938, item (152a)). The Court ignored the fact that the difficulty of managing the receivership did not lessen the duty to apply to the management the laws governing the conduct of the receivership. Further-

more, they ignored the fact that the difficulty of receivership management is not the criterion of the validity of the Plan purported to have been conceived and executed under the special legislation misquoted by the Respondents; and they ignored that the devisers of the scheme submitted it to the Judge who had evidently misconceived his task in the premises (R., Vol. II, pp. 879-82),—*i.e.*, the duty to remain impartial and to apply the laws and rules, as they exist.

I

In Opinion 317 (p. 2017), the Circuit Court alleged or confessed it did not apprehend the nature and meaning of my appeal. I, therefore, duly petitioned for a rehearing as set forth in the copy of the petition hereinafter. The Circuit Court refused to allow themselves to be informed and insisted on abiding by their uninformed judgment evidenced by Opinion 317. Said fact is evidenced by the Mandate filed on September 23, 1941 in accordance with the Opinion.

The petition for rehearing was, (and is), the following:

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 317—OCTOBER TERM, 1940.

(Argued May 22, 1941 Decided August 12, 1941)

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
*Plaintiff,*

*vs.*

INTERBOROUGH RAPID TRANSIT COMPANY,
*Defendant.*

---

CENTRAL HANOVER BANK AND TRUST COMPANY,
as Trustee,
*Plaintiff,*

*vs.*

MANHATTAN RAILWAY COMPANY, *et al.*,
*Defendants.*

---

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *et al.*,
*Plaintiffs,*

*vs.*

INTERBOROUGH RAPID TRANSIT COMPANY, *et al.*,
*Defendants.*

---

# PETITION

*To the Honorables, Judges Swan, Augustus N. Hand and Clark, Circuit Judges:*

Undersigned petitioner, for the purpose of demonstrating that it is fitting and proper that your Honors allow and

order a rehearing of his appeal, decided by you on August 12, 1941, respectfully shows:

I

That you said (p. 2006):

> "As the receivership dragged on it became clear that the solution of many of the problems arising between Interborough and Manhattan and their respective security holders, depended on a solution of the question of the right of Interborough's receiver to disaffirm the burdensome Manhattan lease."

This statement, unfortunately, evidences the fundamental misconceptions that: (a) time was needed for perceiving that such was the case, and (b) the "question" of the right to disaffirm could not have been promptly or summarily disposed of.

Actually, said "problems" and the dependency of their solution upon solution of the "question" of right to disaffirm the lease were clear and apparent at the very outset of the receivership. The bill of complaint by American Brake Shoe and Foundry Company and Manhattan's petition for extension of the receivership to itself, accomplish this. In March of 1933, Interborough receivers' Application No. 17 and Manhattan receiver's Application No. 5 re-emphasized all said matters.

Relying on these facts and the decisions of this Court in the matter of disaffirmance, petitioner raised the issue of wrongdoing by Judge Manton and the Interborough receivers in (1), neglecting to protect Manhattan, its creditors and stockholders; (2), delaying solution of said "problems" particularly the "problems" of righteousness of creating defaults on the Manhattan mortgages and not curing the defaults; and (3), delaying solution of the "problems" of whether all items of rentals under the Manhattan lease

should be defrayed and paid by the Interborough estate. Petitioner, likewise, raised the issue that the succeeding judges continued in said errors.

Relying on the facts (1), that it is an elementary proposition of law that no fraction of a railroad route may be abandoned without the consent of the grantor of the franchise; (2), that surrender of Manhattan owned lines would constitute abandonment of fractions of Interborough's routes, despite resistance by the State and City to noncompliance with the Interborough franchises; and (3), that the provisions of paragraph 3, Section 24 of the Rapid Transit Act of this State must be read into Interborough's franchises as if fully set forth therein, this petitioner raised the issue that the "question" of right to disaffirm the lease was actually and visibly untenable, throughout the receivership.

Relying on all the said facts, the petitioner also raised the following issues:

(1) That the foreclosure of the Manhattan mortgage was based on the errors of the Court which allowed the foreclosure and that the foreclosure was unfair.

(2) That the with-holding of rentals due Manhattan and petitioner was based on said errors and was unfair.

(3) That allowing any offset to Manhattan's claims against Interborough, in favor of Interborough for its claims against Manhattan, was necessarily predicated on said erroneous premise of right to disaffirm the lease, and that imposing any such allowance was unfair.

Petitioner raised other issues including that of restoration by Interborough bondholders of over $70,000,000 improperly paid.

The above issues were presented for decision as necessary prerequisites needed for the correct determination as to the fairness of the Plan in question. These issues do not constitute reargument of the disaffirmance issue. Your Honors stated correctly that the latter was "the question of the right of Interborough's receiver to disaffirm the burdensome lease." The decision of this Court entered April 17, 1939, is that there was no such right. Petitioner, relying on said decision and the holdings in *Murray* v. *Roberts,* seeks to test the fairness of the plan by determination of said issues in the aforesaid manner.

II

That you said (p. 2006),

> ". . . on April 17, 1939 an opinion was handed down holding that because of certain franchise obligations to the City the lease could not be disaffirmed unless, as a result of negotiations with the City, these obligations could be performed by some means other than affirmance. This decision established the City's strategic position in the affairs of the companies . . .".

This statement confirms that this Court solved said "question" of right to disaffirm, by answering it in the negative but, unfortunately, the statement evidences additional fundamental misconceptions of the case.

Said negotiations were not to be with the City alone. They were to be "with Manhattan and with the City" (*Murray* v. *Roberts,* 103 F. (2d) 889, 897-8). Consequently the City could not have been established alone in said "strategic position in the affairs of the Companies".

Manhattan, consequently, was established in strategic position and was entitled to the benefits thereof. Said bene-

fits were, (1), that of being solvent, rightfully, at the time of the Plan; (2), that of being entitled to restoration and replenishment of the value of its property, under the lease; (3), that of having successfully disproved the validity of Interborough's claims against Manhattan by reason of an affirmed lease; and, (4), that of having successfully established the priority of Manhattan rentals over payments to Interborough bondholders and 7% noteholders and the right to recover in respect to said $70,000,000.

Petitioner raised a number of issues growing out of the decision (*Murray* v. *Roberts*) that there was no right to disaffirm the Manhattan lease. These issues do not "constitute in substance a reargument of the disaffirmance issue" (opinion August 12, 1941, p. 2017), but are issues that should be decided because prerequisite to a correct determination of whether this Plan is fair to Manhattan, its senior bondholders, its Second Mortgage bondholders and the holders of its guaranteed stock. Petitioner having the three classes of securities, under the affirmed lease, is in the strategic position that rental alone, due him to July 1, 1940 totaled $56 per share besides being a creditor and shareholder.

Judge Patterson was clear in stating, on June 16, 1938 that if there was no right to disaffirm the Manhattan lease, "Manhattan bondholders and stockholders with unmodified stock will receive payment in full at the expense of other Interborough creditors" (item 151, R. p. 937—page 10395 of Receivership Record).

Judge Patterson wrongfully ignored this Court's Mandate to enforce its decision of April 1939 to do justice and proceed to enforce the decision and its consequences.

Therefore, *petitioner raised the issue that this was wrongful to Manhattan and petitioners and others similarly situated as well as to this Court.* This issue does not "constitute in substance a reargument of the disaffirmance issue but grows out of the decision of April 17, 1939. Others

may sell or otherwise dispose of their rights—but they may not properly dispose of Manhattan Company's rights or force petitioner and others similarly situated to enter into their agreements. Certainly these issues should be determined and are needed for a correct decision of whether this plan is fair to Manhattan, petitioner and others similarly situated.

Petitioner respectfully submits that because of the matters hereinabove set forth it is fitting and proper that there be a rehearing of his appeal herein.

WHEREFORE petitioner prays your Honors to grant and order a rehearing of his said appeal.

Dated August 26, 1941.

SOLOMON G. SALOMON
*pro se*
18 Pine Street
Woodmere, New York.

The foregoing petition is true and not made for the purpose of delay and I believe it is well founded in point of law.

.....
SOLOMON G. SALOMON

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered September 23, 1941. The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

This petition for writ of certiorari for review by Your Honors is the result of the Circuit Court's action of having ignored and failed to consider the matters involved in my appeal to them.

## QUESTIONS PRESENTED

**The matters to be considered in connection with this petition are:**

*1st.* Whether, for the proper purposes of law and equity, the offer of the City to purchase ⅔ or more of the Manhattan capital stock was converted into an executed contract between the depositing holders thereof and the City on November 22, 1939; and whether it was necessary, under Section 124 of the "Unification Statute", for the security holders or the City to seek the approval of the Court in respect to their contract.

*2nd.* Whether the City was authorized by law to pay $12,096,160 in its interest-bearing "promises to pay" for 600,000 shares of Manhattan stock if the company were insolvent in the bankruptcy sense.

*3rd.* Whether the Manhattan Company was solvent in the bankruptcy sense vis-a-vis its First Mortgage bondholders under the following circumstances.

The City actually paid to Merle-Smith, et al., for title to Manhattan properties, purportedly acquired via foreclosure, $27,152,750 in "promises to pay" for transfer of said title. The mortgage was secured by pledge of all income from and product of liquidation of the property pledged. Therefore, by adding together the $18,000,000

purported compromise allowance, the $6,400,000 distributable cash under the Plan, the $2,033,500 received on account of interest to January 1, 1939, and about $1,000,000 (3% interest on $33,552,750 from July, 1939 to June 12, 1940), and said $27,152,750, it becomes apparent that about $54,586,250 of assets were available to pay principal and interest of about $42,920,000 due on Manhattan First Mortgage bonds. Consequently, a surplus of about $11,666,000 should have been available to be returned to the Company.

*4th.* Whether the said $11,666,000 rendered the Manhattan Company solvent and made possible the payments in full of about $5,704,508 principal and interest due on Second Mortgage bonds payable June 12, 1940; leaving a visible residue of about $4,960,000 available for distribution to the stockholders, in addition to other recoverable amounts due Manhattan Company.

*5th.* Whether the Rapid Transit Act, Section 24, paragraph 3, precluded the possibility of disaffirmance of the Manhattan lease at all times prior to June 12, 1949.

*6th.* Whether, possibility of disaffirmance being precluded, the $42,894,000 claim of Interborough Receiver against Manhattan Company for improvements under the Extension and Third Track Certificates was, in fact, untenable under the March 15th, 1913 Agreement and every other agreement between Interborough and Manhattan.

*7th.* Whether the $42,894,000, being an untenable claim, could be used to offset the tenable claims arising out of the affirmed lease so as to reduce the tenable claims to $18,000,000.

*8th.* Whether the foreclosure of the Manhattan Mortgage was based solely on errors committed by the Court and is, therefore, invalid in law and equity, and consequently, is not a due process of law for the transfer of title of Manhattan property to the City.

*9th.* Whether, as a matter of law, the City was authorized to acquire title to Manhattan properties via the processes provided in the provision of the "Unification Statute", (set forth in my Reply Brief on pages 7 and 8): and forbidden to acquire title by any other method.

*10th.* Whether the Plan and Agreement is feasible as a matter of law.

*11th.* Whether the decision of the Circuit Court was based on an informed judgment.

*12th.* Whether the receiverships were or could be terminated by reason of transfer of part of the receivership assets to the City, and whether my duly demanded determination of the invalidity of the interim payments in respect to the Interborough bonds and 7% notes can properly be refused.

*13th.* Whether, Judge Patterson negligently or purposely held, in his Disaffirmance Opinion of June 16, 1939, (filed June 18th) that,

> "No outright covenant to operate the Manhattan lines either alone or along with the extensions for any definite time can be found in the Extension Certificate."

since as a matter of fact the Extension Certificate provides, that,

> "The authorization or licenses hereby granted . . . shall be held by the Interborough Company for a period of eighty-five (85) years from the date on which the Interborough Company shall first begin operation of any part of any of the (Extensions) Railroads, unless sooner terminated as hereinafter provided."

and, whether he violated the principle enunciated in *Edwards* v. *Kearzey*, (*supra*, in division D of Statements of Fact), by neglecting to read Section 24, paragraph 3 of the Rapid Transit Act into the Extension Certificate, repeatedly quoted by me in my Main Brief, (below), which provisions provide that an extension constructed, will have been constructed by the grantee of the franchise,

> "with like effect as though the same had been a part of the original route of . . . its railroad then in actual operation . . . ."

*14th.* Whether, in its decision in 99 F. 2d 789, (*supra*, divisions C and D), the Circuit Court violated Rule 1 of the Federal Rules of Civil Procedure, referred to in said divisions C and D.

*15th.* Whether, the Circuit Court by failing to definitely decide the Manhattan lease must be affirmed, glossed over Judge Patterson's evident misconception of Interborough's obligations under the Extension Certificate, set forth in 13th, (*supra*); caused confusion in the minds of the unaware; and encouraged Mr. Murray to disingenuously petition this Honorable Court, on November 27, 1939, during

its October Term, 1938, (No. 552), for writ of certiorari, for the purpose of delaying enforcement of the Mandate in *Murray* v. *Roberts, (supra)*, hoping the Plan here in question would, in the vernacular, be "put over" without the holders of Manhattan securities becoming aware of the actualities.

On the same day or shortly thereafter, Manhattan Receiver Roberts filed cross-petition, (same Term), No. 558. But he joined with others, in the motion made on or about December 14, 1939, (opposed by Counsel for Harold Palmer, *et al.*, on behalf of holders of Manhattan 7% Guaranteed Stock), thus aiding in the said "putting over" of the Plan.

In order to enable this Court to form a correct estimate of the real intent of the petition and cross-petition, I incorporate the latter herein, by reference. Said cross-petition, same Term, was numbered No. 558, copy annexed hereto, (Appendix A). I except from said incorporation herein, the limitations as to not asking this Court to consider the substance of the petition unless Mr. Murray's contentions are considered by Your Honors. I also except from the statement from page 4 thereof,

> "the opinion of the District Court contains a comprehensive statement of the facts in the case . . ."

and the statement on pages 4 and 5 thereof, to wit:

> "The elevated operations were carried on pursuant to four principal instruments . . . (4) 'Third Track Certificate' granted to Manhattan Railway Company on March 19, 1913, for the construction and operation of third tracks on the Second Avenue, Third Avenue and Ninth Avenue Elevated Lines . . ."

I reject the latter two statements because, (see my Main Brief, pp. 14 and 20), the Court of Appeals of the State of New York held, in *City of New York* v. *Interborough Rapid Transit Co.*, that on March 19, 1913, the Extension Certificate was issued to Interborough and that,

> "On the same day an instrument known as the additional track certificate was issued to Interborough", (257 N. Y. 20, 30).

The Circuit Court in *Murray* v. *Roberts*, (*supra*, p. 894), referring to the Joint Trackage Agreement, the Extension Certificate and the Third Track Certificate, said,

> ". . . if Contract No. 3 is a part of a single franchise with the three, it is not important whether that franchise is 'mandatory' or not, for the Interborough cannot surrender one part and keep the rest, . . . But that we need not decide, because the Court of Appeals in *New York* v. *Interborough Rapid Transit Co.* (257 N. Y. 20) has decided it for us."

Your Honors will, no doubt, consider whether the decision of the Court of Appeals as to whom the Third Track Certificates was issued, is equally binding on the Circuit Court, Judge Patterson and all parties to the proceedings in *Murray* v. *Roberts* (*supra*) as the decision last cited, hereinabove.

*16th.* Whether, (a), my appeals involved fundamental matters on which the validity of Manheim's contentions depended and depend; (b), whether the decision of Manheim's contentions can possibly constitute a consideration of the fundamental matters involved in my appeal; and

(c), whether, contrary-wise, it was requisite to carefully pass on the matters involved in my appeals, in order to decide the validity of Manheim's contentions and whether the Plan was feasible under the existing circumstances of the Receivership and under the "Unification Statute".

*17th.* Whether, if the Circuit Court had not been prejudiced in favor of their associate Judge Patterson (Opinion 317, last paragraph), the Circuit Court would have had any color of excuse to utter the "obiter dictum" contained in the first sentence of said last paragraph; and because of such twaddle, to allow itself to ignore my contention; and, whether, absent such prejudice, my contentions can be grasped even through the crass fraud revealed by my statement of the case, may have caused the Circuit Court to gasp, and say, like the man, who on seeing the giraffe in the zoo said, "I don't believe there is any such animal".

In connection with the matter of fraud, I would call Your Honors attention to the principle voiced by the Court of Appeals of the State of New York, in *Warren* v. *Union Bank of Rochester,* (157 N. Y. 259, 271), wherein said Court cited with approval the following passage from *Warner* v. *Blakeman,* (4 Keyes 487), which reads:

> "It is the just and proper pride of our matured system of equity jurisprudence that fraud vitiates every transaction; and however men may surround it with forms, solemn instruments, proceedings conforming to all details required in the laws, or even by the formal judgment of courts, a court of equity will disregard them all, if necessary, that justice and equity may prevail."

Your Honors, no doubt, will find said citation to be a correct statement of principle, applicable not only in cases arising in District Courts in the State of New York, but in all cases over which the Federal Courts have jurisdiction.

*18th.* Whether the Circuit Court negligently or purposely accepted and incorporated into its statement of facts, (1), the averred schedule of deposits of securities on November 22, 1939, stated by Respondents, on page 25 of their answering brief below; (2), did not notice that 27.55% of 43,500 shares of Manhattan 7% Guaranteed Stock and 63.27% of 556,500 shares of Manhattan Modified Guaranteed Stock represents about 364,085 shares or less than ⅔ of 600,000 shares of Manhattan Capital Stock and incorporated the mis-statement in their Opinion 317; and thereupon negligently or purposely ignored that, (3) the evidence on pages 385-87, Volume I of the Record on Appeal, shows that 400,675 or over ⅔ had been deposited on said day; (4) overlooked Respondents' misstatement of Section 123-2 of the "Unification Statute", revealed on pages 7 and 8 of my Reply Brief below; (5), exercised an uninformed judgment, by ignoring the necessary actual fact and the natural results of the actual occurrences; (6), on such basis presumed to determine that the Respondents' version of the matters involved in my appeal should be accepted, and my actually proven averments rejected; and (7) finally presumed to affirm the Plan as feasible whereas it was effectuated by methods contrary to the Mandate of the law, set forth in said eloquently omitted provision of the law.

*19th.* Whether:

1—The petition in which I joined in December, 1932, (copy annexed hereto, marked Appendix B), was correct

and prophetic of things to come in the Interborough Receivership;

2—Said petition should have been granted;

3—The policy of excluding participation by discerning individuals, having actual investments, was continued by Judge Patterson, (as evidenced by Mr. Roberts' Allegation 1 in the introductory averment to my petition annexed to his Application No. 33, *supra*, Statement of Facts, D and H), and remained unchanged during the regime of Robert P. Patterson, as Judge in charge of the Interborough Receivership;

4—The memorandum, (copy annexed hereto, marked Exhibit C), submitted by Robert E. Connolley, Esq., to Judge Patterson, in support of the application of certain parties asking leave to intervene in the Interborough Receivership proceedings, particularly the matter of the Plan, under Rule 24(a) of the Federal Rules of Civil Procedure, was improperly denied by Mr. Patterson;

5—The failure to grant the petition supported by said memorandum evidences the fact that Mr. Patterson was determined to accomplish his own purposes, regardless of the Federal Rules of Civil Procedure Nos. 1 and 24 (a), and whether same eloquently pleads the correctness of the note in Yale Law Journal, Vol. 47, page 746, (March 1938), and subsequent quotations cited in Mr. Connolley's memorandum are applicable to the Interborough Receivership, and showed the "Conclusion" of the memorandum should not have been denied.

*20th.* Whether the application made by Interborough Receivers, (Application No. 17), March 14, 1933, for time

in which to make formal application to disaffirm the Manhattan lease, and the grant thereof by Judge Manton, constituted misfeasance by both of them, because they must be deemed to have had knowledge of all the matters set forth under the heading FUNDAMENTAL FACTORS, on pages 28-33 of my Main Brief.

*21st.* Whether Judge Manton, who had been convicted of selling justice at the time of the hearing of my appeal below, could by himself have committed the act of misfeasance or nonfeasance hereinbefore referred to in division C of the Statement of Facts, if the judges associated with him in such cases had not been negligent.

*22nd.* Whether the administration of the receivership was corruptly and/or negligently in favor of the controlling bankers.

## SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred in failing to find:

1—Title to Manhattan-owned property could not be lawfully conveyed to the City of New York by the foreclosure method provided in Article Two (2) of the Plan, because Manhattan Railway Company was lawfully and justly solvent; the defaults in respect to its mortgages were errors of the District Court and its Receivers; and the Court was in duty bound to cure same, particularly when it was duly asked to do so on November 27, 1939 (R., Vol. II, pp. 594-6), on March 31, 1933 in Manhattan Receiver's Application No. 5 and on numerous other occasions;

2—"The law of the case", in respect to disaffirmance of the Manhattan lease was and is Section 24 of the Rapid Transit Act; the Mandate of said law, that the elevated routes must be operated as if they were original routes; and, consequently, Interborough Receivers could not possibly have had any right to disaffirm the lease up to and including June 12, 1940;

3—The City after obtaining control of the ⅔ majority of Manhattan stock, on November 22, 1939, could not lawfully disaffirm the Manhattan lease, but was in duty bound to proceed to the dissolution of the Company and to ascertainment of non-assenting security holders' rights in and to their company's belongings, according to the provision to that effect in Section 123 of the "Unification Statute";

4—The City after obtaining control of Interborough Rapid Transit Company and Manhattan Railway Company, on November 22, 1939, did not have lawful or equitable right to dissolve the two companies except by lawfully paying out the duly determined worth of non-assenting minority interests, if any, in and to the respective belongings of the respective companies (*Consolidated Rock Products Co.* v. *DuBois*, 85 L. ed. 603);

5—The Plan was unfair because of all the reasons set forth by Appellant on pages 8-11 inclusive of his Main Brief below, and because of the errors and facts set forth on pages 6 and 7 of said brief, in paragraphs marked A, B, C, D, E;

6—The Plan and methods employed by the District Court and the Respondents amount to attempted coercion of Appellant and others similarly situated, and is in law and equity a fraud upon Appellant and others similarly situated;

7—The Receivership Estate was unnecessarily burdened with hundreds of thousands of dollars by way of expenses and fees because of the raising of disingenuous claims and unnecessary litigation such as the formula proceedings and other special proceedings; all of which could have been avoided by the summary dismissal of the Interborough Receivers' averred rights to disaffirm the Manhattan lease;

8—The Plan was an unlawful and wrongful Plan designed to perpetuate and not correct the wrongful administration of the Receivership Estate and the acts of misfeasance and nonfeasance of the Receivers and the District Court.

## REASONS FOR GRANTING THE WRIT

Rule 1 of the Federal Rules of Civil Procedure, particularly the second sentence thereof, shows the ever-recurrent tendency of the Statutory Courts to disregard the very essence of justice, to wit: the determination of controversies submitted to a Court, with all possible speed, and at as small expense as possible in the particular case. The just, speedy and inexpensive determination of causes is therefore, rightfully, the first rule imposed on all District Courts alike.

In the present instance, the said principle was violated by the dilatory practices commencing in and before Inter-

borough Receivers' Application No. 17 was filed on March 14, 1933. The issue, though joined on March 31, 1933, did not come to trial until November 1937, notwithstanding the facts of the Rapid Transit Act. The violation flared up again in the instance of the issuance of the Mandate of the Circuit Court, filed July 25, 1939, reversing Judge Patterson's idea that a right existed to disaffirm the Manhattan lease. The Mandate commanded that there be further proceedings according to law, justice and the laws of the United States. Judge Patterson, on July 27, 1939, adopted the Mandate and thereby ordered Receiver Murray to obtain means other than the Manhattan lease to enable him to fulfill the franchise obligations Interborough had undertaken on March 19, 1913, or to affirm the lease. The next day, July 28, 1939, he thumbed his nose at the law and the Mandate by suspending any action thereunder, expecting to help "put over" the Plan and "duck" his duty to correct the errors of the Receivers which he had adopted on June 16, 1938. He brushed aside the request that he obey the Mandate, made on November 27, 1939 (R., Vol. II, pp. 594-6), when it had become evident that the officers and directors displaced by the Manhattan Receiver, and the Manhattan Receiver, would do nothing in the premises.

Judge Patterson's stubborn bias in favor of the Interborough Bankers' interests in the Interborough bonds and 7% notes is evidenced by his advocacy of the cause of the Interborough bondholders and 7% note holders recorded at pages 879-83 of the Record on Appeal herein, even when confronted with the clear holding in *Murray* v. *Roberts* that these bond and note holders were coadventurers with the stockholders, because their investments are also devoted to performing the obligations of the 1913 franchises and

contracts, since their monies were loaned after March 19, 1913. The rationale of said holding confirmed the contention (allegation 9) in Manhattan Receiver's Application No. 5, March 31, 1933, alleging Manhattan and the holders of its guaranteed 7% stock were and are operating creditors of the Interborough System.

Judge Patterson's determination to nevertheless deprive me, and others who refused to be bullied, of our rights, is wholly inexcusable. The example or precedent which might become unjustly established for many years, as *Swift* v. *Tyson* was, should be wiped out by a no uncertain condemnation by this Honorable Court. It is, I submit, a matter of the gravest public concern that the just laws embodied in our Constitution and other proper statutes shall not be violated by the Courts, whose first duty is to abide by same and enforce the laws, and the principles of equity.

Even if it should be thought that the Interborough Receivership may be the last of the important Equity Receiverships, it should be impressed upon the Statutory Courts that the principles underlying Equity Receiverships must be applied where liquidations are involved, as is the case in the present instance.

Furthermore, the Statutory Courts should learn once and for always that the law governing reorganizations is based on the very principles violated in this receivership. The decision below to end the receivership without any determination of priorities, though same was duly asked, should be condemned by this Court.

There are many reasons which will, no doubt, occur to this Court itself, why it should review the matter of the feasibility of the Plan. However, I respectfully submit,

the unconscionable disregard of the fact that the "Unification Statute", or any similar state legislation, could not supersede the laws and rules laid down in the Constitution and statutes governing methods and proceedings in receiverships, ~~and~~ should be made so clear that no Judge, in the future, will presume to be a law unto himself; and no Circuit Court will presume, in the future, to "duck" the questions and matters plainly involved and set forth in an appeal from the decision of a District Court or administrative body.

## CONCLUSION

Wherefore, petitioner respectfully prays that his petition be granted.

Respectfully submitted,

SOLOMON G. SALOMON,
*pro se,*
18 Pine Street,
Woodmere, N. Y.

**EXHIBIT A**

IN THE

SUPREME COURT OF THE UNITED STATES

| | |
|---|---|
| WILLIAM ROBERTS, Receiver of Manhattan Railway Company,<br>*Petitioner,*<br>*against*<br>THOMAS E. MURRAY, as Receiver; INTERBOROUGH RAPID TRANSIT COMPANY; J. P. MORGAN and others as Committee; GUARANTY TRUST COMPANY OF NEW YORK as Trustee; J. HERBERT CASE and others as Committee; NORMAN JOHNSON and others as Committee; DWIGHT F. FAULKNER, JR., and others as Committee; BANKERS TRUST COMPANY as Trustee; THE CITY OF NEW YORK and TRANSIT COMMISSION,<br>*Respondents.* | No. , October Term, 1939 |

## CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Your petitioner, William Roberts, as Receiver of Manhattan Railway Company, prays that, in the event this Honorable Court grants the petition for writ of certiorari in the cause of Thomas E. Murray as Receiver of Interborough Rapid Transit Company *et al.* against The City of New York, Transit Commission, William Roberts as Receiver *et al.*, which petitioner is informed and believes

will be filed with this Court on or about November 27, 1939 to review a judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above cause on June 7, 1939, petitioner be also granted a writ of certiorari to review said judgment to the end that if this cause is to be reviewed by this Court, all the questions which were before the Circuit Court of Appeals will also be before this Court.

Petitioner believes that the decision of the Circuit Court of Appeals in this cause is not of a character to warrant review by this Honorable Court under the principles followed in its consideration of applications for certiorari. He intends to oppose any application for writ of certiorari which may be filed in behalf of the Receiver of the Interborough Rapid Transit Company or other Interborough parties. In the event, however, that despite your petitioner's opposition a writ of certiorari should be granted upon the application of said Receiver or other parties, your petitioner desires that the review by this Court of the decision of the Circuit Court of Appeals for the Second Circuit embrace all of the questions which were before that Court. Certain issues were decided by the Circuit Court of Appeals adversely to the contentions of your petitioner and it is possible that if these issues had been decided in favor of petitioner, the judgment of the Circuit Court of Appeals would have been different from that which was rendered. In these circumstances, petitioner is advised that it may be doubtful whether such issues would properly be before this Court in the absence of a cross-petition for writ of certiorari filed on his behalf, and in accordance with the practice recognized in *Stelos Co.* v.

*Hosiery Corp.*, 295 U. S. 237, 238, 239, files this cross-petition for certiorari.

## OPINIONS BELOW

The opinion of the District Court of the United States for the Southern District of New York (R. Vol. III, pp. 1471-1508) is not as yet officially reported. The opinion of the Circuit Court of Appeals for the Second Circuit (R. Vol. VI, pp. 3045-3059) is officially reported in 103 F. (2d) 889.

## JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. The judgment of the Circuit Court of Appeals was entered June 7, 1939 (R. Vol. VI, p. 3131). Petitions for rehearing were duly presented by Thomas E. Murray, as Receiver of Interborough Rapid Transit Company and by Guaranty Trust Company of New York, as Trustee of the Interborough First and Refunding Mortgage on May 12, 1939 (R. Vol. VI, pp. 3060-3128) and were denied on June 2, 1939 (R. Vol. VI, pp. 3129, 3130). Leave to file a second petition for rehearing was granted to said parties on June 13, 1939 (R. Vol. VI, p. 3131). This second petition for rehearing was filed by them on June 21, 1939 (R. Vol. VI, pp. 3132-3152), and was denied on June 28, 1939 (R. Vol. VI, p. 3153). On September 21, 1939, Honorable Stanley Reed, an Associate Justice of this Court, granted your petitioner an extension of time within which to file a cross-petition for writ of certiorari to November 27, 1939 (R. Vol. VI, p. 3156). This application is therefore in due time. *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498.

## QUESTION PRESENTED

Whether the Interborough Receiver must retain possession of the Manhattan Railroad in order to perform his obligations to the City of New York.

## STATEMENT

The opinion of the District Court contains a comprehensive statement of the facts in the case (R. Vol. III, pp. 1471-1508) which it is difficult, if not impossible, to condense. The opinion of the Circuit Court of Appeals adopted the facts as stated by the District Court and presupposed familiarity with them (R. Vol. VI, p. 3046).

The issues in the courts below turned upon the construction and effect to be given to certain instruments and contracts entered into by the Interborough Rapid Transit Company which provided for the operation by that Company of a system of subway and elevated railroads in the City of New York.

The following summary statement is believed sufficient to introduce the questions raised by this cross petition.

The Interborough Company operated the subways under three contracts with the City of New York, known as Contracts Nos. 1, 2 and 3, the last mentioned contract having been entered into on March 19, 1913 (R. R. Ex.,* Vol. I, pp. 279-430; *id.*, Vol. III, pp. 1011-2252).

The elevated operations were carried on pursuant to four principal instruments: (1) A lease made by Manhattan

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*This notation refers to the three volumes of so-called Receivership Record Exhibits which were incorporated into the record by stipulation of counsel and order of court (R. Vol. VI, pp. 3037, 3038).

Railway Company to Interborough Rapid Transit Company, dated January 1, 1903, for a term of 999 years from November 1, 1875, of substantially all of the property of Manhattan Railway Company, including the Second Avenue, Third Avenue, Sixth Avenue and Ninth Avenue Elevated Lines (R. R. Ex., Vol. I, pp. 431-482);* (2) "Extensions Certificate" granted by Public Service Commission of the State of New York on March 19, 1913 authorizing Interborough to construct and operate four extensions to the property leased from Manhattan Railway Company, which connected Manhattan Elevated Lines with the subways constructed and operated under Contracts Nos. 1 and 3 (R. R. Ex., Vol. II, pp. 505-571); (3) "Joint Trackage Agreement" entered into on March 19, 1913, which prescribed the terms under which the Interborough, as the lessee of the Manhattan Railway Company and as grantee of the Extensions Certificate, should have trackage rights over certain sections of the subway tracks constructed under Contract No. 3 (R. R. Ex., Vol. II, pp. 651-666); (4) "Third Track Certificate" granted to Manhattan Railway Company on March 19, 1913, for the construction and operation of third tracks on the Second Avenue, Third Avenue and Ninth Avenue Elevated Lines (R. R. Ex., Vol. II, pp. 585-637), the obligations of which were assumed by Interborough by agreement with Manhattan Railway Company, dated March 15, 1913 (R. R. Ex. Vol. I, pp. 489-498), the Public Service Commission of the State of New

*The rental under this lease was reduced by the consent of a large percentage of Manhattan Railway Company stockholders pursuant to a Readjustment Plan of 1922; R. R. Ex., Vol. II, pp. 713-760.

York consenting to the assignment to Interborough of the rights of Manhattan Railway Company under this certificate by order dated March 20, 1913 (R. R. Ex., Vol. III, pp. 2253-2263).

The relationship between Contract No. 3, relating primarily to subway operations, and the Extensions Certificate relating primarily to elevated operations, was authoritatively determined by the New York Court of Appeals in *City of New York* v. *Interborough Rapid Transit Company*, 257 N. Y. 20, where the Court said (p. 36):

> "Although expressions of the detailed purposes of these instruments are incorporated in separate documents, they were executed on the same day and are so interlocked and combined in their common scheme, so inextricably interwoven, that each must be regarded only as part of an integral transaction."

The Court also referred to specific provisions in Contract No. 3 and the Extensions Certificate as demonstrating "the intermingling of the subject-matter of the two instruments and the extent of the contemplated union in operation of the elevated and subway systems".

Two other contracts should also be mentioned: By Agreement of July 16, 1903 (R. R. Ex., Vol. I, pp. 465-482) Contract No. 1 was amended so as to provide a connection between the Third Avenue Elevated near 149th Street and the Contract No. 1 subway line and to permit through trains to operate over the subway and over this connection and over the Manhattan Leased Line. By Agreement of June 7, 1906 (R. R. Ex., Vol. I, pp. 483-488) passengers riding north upon the Manhattan Line south of 149th Street were afforded the right to continue their trip on the Contract No. 1 Line without the payment of addi-

tional fare and conversely passengers on the subway line were afforded the right to continue south on the Manhattan Line without the payment of additional fare.

Receivers were appointed for Interborough Rapid Transit Company on a general creditor's bill on August 26, 1932 (R. Vol. I, p. 1). Manhattan Railway Company intervened in the receivership and petitioner was appointed Receiver of Manhattan on September 6, 1932. On March 31, 1933, petitioner, as Manhattan Receiver, filed his Application No. 5 for an order adjudging that the Interborough Receivers were without authority to disaffirm the Manhattan Lease and directing the Interborough Receivers to pay all items of Manhattan rental (R. Vol. I, pp. 14-33). On February 1, 1934, the Interborough Receivers filed their Application No. 52 for leave to disaffirm the Manhattan Lease (R. Vol. I, pp. 179-272). On March 28, 1934, the City of New York and the Transit Commission filed separate petitions in the receivership cause for leave to sue the Receivers of Interborough and Manhattan in the State court, to the end that an adjudication might be had in the State court of the extent of Interborough's obligations to the City of New York under the instruments above referred to (R. Vol. I, p. 8). This application was denied on January 10, 1935 (10 F. Supp. 512), which decision was affirmed by the Circuit Court of Appeals upon the opinion below (76 F. (2d) 1002); and certiorari was denied on June 3, 1935 (295 U. S. 760). In October, 1937, the Interborough Receiver filed applications for leave to disaffirm the Extensions Certificate (R. Vol. II, pp. 665-675), the Joint Trackage Agreement (*id.*, pp. 701-702) and the Agreement of June 7, 1906 (*id.*, pp. 653-658). Petitioner, as Manhattan Receiver, filed

Application No. 26, supplementing his Application No. 5, for an order directing the Interborough Receiver to affirm the Manhattan Lease (*id.*, pp. 740-752). The City of New York and the Transit Commission filed petitions alleging, among other things, that the loss of possession of the properties and trackage rights over the railroads leased by Manhattan Railway Company to Interborough Rapid Transit Company would incapacitate the Interborough Receiver to perform its obligations under the 1913 transaction and the June 7, 1906 Agreement (R., Vol. I, p. 8; Vol. II, pp. 618-626, at pp. 624, 625). On June 18, 1938, the District Court filed an opinion, in substance, granting Interborough Receiver's Application No. 52 to disaffirm the Manhattan Lease, but providing for a stay of the operation of the order until appeal could be heard in the Circuit Court of Appeals. It denied Interborough Receiver's applications to disaffirm the Extensions Certificate, the Joint Trackage Agreement and the Agreement of June 7, 1906 but held that the obligations of the Agreement of June 7, 1906 could be satisfied by the establishment of a free transfer point at 149th Street and Third Avenue for passengers entitled to its benefits (*id.*, Vol. III, pp. 1507-1508, 1510-1514). The District Court denied Manhattan Receiver's Applications Nos. 5 and 26 and denied the petitions of the City of New York and Transit Commission, except in so far as they had been granted by the refusal of the Court to grant Interborough Receiver's applications to disaffirm the Extensions Certificate, the Joint Trackage Agreement and the Agreement of June 7, 1906 (*id.*, Vol. III, p. 1514).

The Circuit Court of Appeals affirmed the decision of the District Court in so far as it required the Interborough

Receiver to perform the obligations of the Extensions Certificate and the Joint Trackage Agreement, and held that these obligations could not be performed without retention of possession of the Manhattan third tracks. The Circuit Court of Appeals further held that the Manhattan Third Track Certificate was indissolubly linked with the Extensions Certificate as a part of the franchise obtained by the Interborough from the City of New York on March 19, 1913. The Circuit Court of Appeals did not attempt to settle the order but made a general statement as to the instructions which should be given to the Interborough Receiver. This statement is as follows (R. Vol. VI, p. 3058):

> "It is impossible definitively to settle the terms of the order now, but the receiver's instructions should in general be as follows. He must continue to keep possession of all tracks which are authorized under the 'Third Track Certificate', and he must exploit them sufficiently to protect the certificate against forfeiture for nonfeasance. He must operate through trains over the 'Extensions' and joint tracks, and this will almost certainly make it desirable to continue them over the third tracks as well. (We do not at present decide whether if it is not desirable to do so, he must nevertheless give such through service.) He must accept northbound passengers free upon the 'West Farms Extension', whatever their destination (except so far as by agreement transfers are substituted). As possessor of the Manhattan third track on Third Avenue he must similarly accept southbound passengers free. He will reject the Manhattan lease if he is able to perform the foregoing obligations to the City by any other means than affirmance of it; but if after negotiations with the Manhattan and with the City no other

> means is possible than affirmance of the lease, he must affirm the lease."

Proceedings before the District Court to settle the order in accordance with this decision have been held in abeyance due to an agreement which has been entered into by Committees representing security holders of Interborough Rapid Transit Company and Manhattan Railway Company for sale of the properties of both companies to the City of New York (the so-called Unification Plan).

In reaching its decision, the Circuit Court of Appeals rejected certain contentions made by petitioner, which, if accepted, would necessarily have affected the instructions to be given to the Interborough Receiver.

One of these contentions is based upon Article VI of the Extensions Certificate. This Article is as follows (R. R. Ex., Vol. II, pp. 521, 522):

> "The Interborough Company shall be entitled to charge for a single fare for each passenger for one continuous trip in the same general direction over the Railroads (including the parts of the municipal railroad over which the Interborough Company is provided with trackage rights as in this certificate provided) and the additional tracks (which shall mean the additional tracks authorized by the Commission by certificate to the Manhattan Railway Company bearing even date herewith) and the Manhattan Railroad the sum of five (5) cents but not more. A trip from any point on the Queensboro Bridge Line (including the part of the municipal railroad over which trackage rights are provided) to any point on the Manhattan Railroad or on the Railroads, or a trip from any point on the Manhattan Railroad or on the Railroads to any point on the

Queensboro Bridge Line (including the part of the municipal railroad over which trackage rights are provided) shall be deemed a continuous trip in the same general direction."

In explanation of this Article it may be said that the word "Railroads" is defined as meaning the extensions authorized by the Extensions Certificate. The "parts of the municipal railroad over which the Interborough Company is provided with trackage rights" are the parts of the subways constructed under Contract No. 3 and extending for long distances in the Bronx and in Queens. The "additional tracks" are those referred to in the Third Track Certificate and the "Manhattan Railroad" refers to the property, rights and franchises leased to the Interborough by the lease of January 1, 1903 (R. R. Ex., Vol. III, p. 508). In explanation of the second sentence of the Article it may be said that the "Queensboro Bridge Line" is merely a connection between the Manhattan Second Avenue Elevated and the subway tracks constructed under Contract No. 3 in Queens. The connection diverges from the Second Avenue Elevated Line at right angles and the obvious purpose of this second sentence is merely to make certain that it would never be contended that a trip over the Queensboro Bridge was not "in the same general direction" as the Second Avenue Elevated Line.

It was petitioner's contention in the courts below that it was necessary for the Interborough Receiver to retain possession of the Manhattan Railroad in order to perform the covenant contained in Article VI to charge five cents but not more for a trip over the Manhattan Railroad, the extensions and the joint tracks. The District Court and the Circuit Court of Appeals rejected this contention, holding,

in substance, that the Article merely fixed the rate of fare, if the ride was given, but that the Article imposed no obligation upon the Interborough Company or upon its Receiver to give the ride.

Article IX of the Extensions Certificate (R. R. Ex., Vol. II, pp. 524-526) obligates the Interborough "to operate over such parts [joint tracks] in conjunction with the Railroads [the extensions] to the end that through service may be provided over such parts over the Railroads and over the Manhattan Railroad". This Article, as well as Article VI, was referred to by the New York Court of Appeals in its opinion (257 N. Y. 20, 36) as demonstrating the contemplated union in operation of the elevated and subway systems. Petitioner contended in the courts below that this covenant could not be performed by the Interborough Receiver without retention of possession of the Manhattan Railroad. The courts below rejected this contention.

Article XII of the Extensions Certificate (R. R. Ex., Vol. II, pp. 537-546) provided in minute detail how the net profits to be derived from the Manhattan Railroad, the additional tracks and the extensions were to be divided between the City of New York and Interborough; and established the order in which the Interborough was to be permitted to make deductions from the gross revenues of the Company Lines as defined in the Article. This Article provided that the taxes incurred in the operation of the Company Lines and rentals necessarily payable for the Manhattan Railroad should be deducted from the gross revenues before even the deduction of operating expenses. Petitioner contended that this order of deductions safeguarded the integrity of the Interborough-Manhattan system and should have been observed by the Interborough

Receiver with the necessary effect that he would retain possession of the Manhattan Railroad. This contention was rejected by the courts below.

## SPECIFICATIONS OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the Receiver of the Interborough Rapid Transit Company might, upon the conditions set forth in the Circuit Court of Appeals' opinion, disaffirm the existing lease of Manhattan Railway Company's properties.

2. In failing to hold that the Interborough Receiver was bound by the terms of the Extensions Certificate to retain possession of the Manhattan Railroad so as to afford through service over the Joint Tracks, Extensions and said Railroad at a five-cent fare.

3. In failing to hold that the Interborough Receiver was bound by the terms of the Extensions Certificate and particularly Article XII thereof to pay the rentals due under the Manhattan Lease out of the gross revenues as defined in the Article before deducting operating expenses from said gross revenues.

## REASONS FOR GRANTING THE WRIT

1. This Court should have the entire case before it in the event that the petition for writ of certiorari filed on behalf of other parties is granted.

2. The Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with the applicable local decisions.

1. It would be manifestly desirable, if a writ of certiorari should be granted at the request of the Interborough Receiver, that the entire case be brought before this Court. As above pointed out, it was the contention of the Manhattan Receiver that the Interborough Receiver was not only obligated to retain possession of the third tracks in order to perform Interborough's franchise obligations to the City of New York as held by the Circuit Court of Appeals but was also obligated to retain possession of the entire Manhattan Railroad. Since, however, if petitioner's argument with respect to the effect of Articles VI, IX and XII of the Extensions Certificate, or any of them, is accepted, the effect would be to change the form of relief authorized by the Circuit Court of Appeals in a way which might be considered to be more favorable to petitioner than that granted, petitioner believes that there is substantial doubt as to whether he would have a legal right to present such arguments to this Court on any review of the decision of the Circuit Court of Appeals if this cross-petition for certiorari were not made. For this reason alone, if this Court should grant the petition for a writ of certiorari made by other parties, it is submitted that the writ prayed for in this petition should also be granted.

2. It is plain that Articles VI and IX of the Extensions Certificate were inserted in the Extensions Certificate so as to assure to the traveling public a through ride for five

cents, not only over the extensions and joint tracks, but also over the Manhattan Railroad and the third tracks. They were the provisions of the Certificate which the New York Court of Appeals relied on as demonstrating "the contemplated union in operation of the elevated and subway systems." *City of New York* v. *Interborough Rapid Transit Co.*, 257 N. Y. 20, 36.

It is submitted that the decision of the Circuit Court of Appeals that Article VI of the Extensions Certificate did not require the Interborough Receiver to retain possession of the Manhattan Railroad is inconsistent with the New York law. *People ex rel. W. S. St. Railway Co.* v. *Barnard*, 110 N. Y. 548; *Beekman* v. *Third Avenue Railway Company*, 153 N. Y. 144. Both of these cases hold, it is submitted, that where in a franchise for an extension to a main line there is a condition as to the rate of fare to be charged for a ride not only over the extension but also over the main line, the owner of the franchise for the extension must give the ride over the main line as well as over the extension.

In the courts below, the Interborough Receiver attempted to distinguish the *Barnard* case on the ground that the resolution of the common council (110 N. Y., p. 554) contained the language that "passengers should be carried", which do not appear in Article VI of the Extensions Certificate. The attempted distinction is without merit because the Court of Appeals held (*id.*, p. 553) that no condition could be imposed unless it were inserted in the notice of sale; and the notice of sale (*id.*, p. 555) did not contain the phrase above quoted but provided simply that the company "shall charge no greater than a five-cent fare for one continuous passage" on the route described, which included

both the main line and the extension. The language of the Court of Appeals (*id.*, p. 557) that "the resolution undoubtedly required the railway company taking the grant to carry passengers to and from points beyond one of its termini" therefore means that the language of the resolution and that of the notice of sale were regarded as synonymous, since, if the language of the resolution were deemed in conflict with that of the notice of sale, the latter, not the former, would have controlled. The Interborough Receiver also asserted that the proceedings in the lower courts show that the question here referred to was not presented in the case, but it is submitted that examination of the record on appeal shows that it was.

In the *Beekman* case, the court considered the effect of Section 93 of the Railroad Law (now Section 173) providing that a franchise for an extension must contain a provision that "but one fare shall be exacted for passage over such branch or extension and over the line of road which shall have applied therefor". The Court held (153 N. Y., p. 161): "The obvious meaning of the statute, is, that in such cases the public should be entitled to passage from point to point over or upon the branches and the main line for a single fare."

Here the question is not whether the fare clause in and of itself imposed an obligation upon the Interborough to operate over the Manhattan Lines. The Interborough Receiver for reasons given by the District Court and the Circuit Court of Appeals is obligated to operate over the extensions and joint tracks; and Article VI requires him, in connection with such operation, to give passengers a ride for five cents over the Manhattan Lines as well.

Under the above authorities, the express covenant contained in Article VI of the Extensions Certificate, means that a passenger is entitled to ride over the Manhattan Railroad as well as over the third tracks and over the extensions and joint tracks. The Interborough Receiver cannot give to passengers the type of ride agreed to be given to them by Article VI unless he retains possession of the Manhattan Railroad. Possession of the third tracks is not sufficient as many passengers have their destinations at local stations on the local tracks and under Article VI would be entitled to be carried to their destinations on the local tracks as well as to express stations on the third tracks.

In *City of New York* v. *Interborough Rapid Transit Company*, 257 N. Y. 20, at p. 27, the Court of Appeals referred to the numerous conferences which had been held among members of the Public Service Commission and of the Board of Estimate and Apportionment with Interborough preceding the execution of the instruments of March 19, 1913, and said (p. 27), "that among the dominant features of those conferences was the proposed use of all the existing rapid transit lines with such of the contemplated lines as were designed to connect with them on the basis of a universal five-cent fare". Such purpose, it is submitted, was carried out by Articles VI, IX and XII of the Extensions Certificate, as well as by the Third Track Certificate.

## CONCLUSION

WHEREFORE petitioner respectfully prays that this cross-petition be granted in the event that the petition for writ of certiorari in *Thomas E. Murray, as Receiver of Interborough Rapid Transit Company* v. *The City of New York, The Transit Commission, William Roberts, as Receiver of Manhattan Railway Company, et al.*, is granted.

Respectfully submitted,

WILLIAM ROBERTS, as Receiver of Manhattan Railway Company, Petitioner,

by

CHARLES E. HUGHES, JR.,
ALLEN S. HUBBARD,
*Counsel for Petitioner.*

Doc. 98

**EXHIBIT B**

**Petition of William Graves Smith, William L. White, E. R. Ritchie, Sol G. Salomon, Marcel H. Stieglitz and Kay Realty Co., Inc., For Leave to Intervene.**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

*To the Judges of the District Court of the United States for the Southern District of New York:*

The petition of WILLIAM GRAVES SMITH, WILLIAM L. WHITE, E. R. RITCHIE, SOL G. SALOMON, MARCEL H. STIEGLITZ and KAY REALTY CO., INC., on behalf of themselves and all others similarly situated, respectfully shows the Court and alleges:

1. Petitioners and members of the immediate families of individual petitioners and persons for whom individual petitioners are attorneys-in-fact, are severally the owners of stock and bonds of the Interborough Rapid Transit Company and Manhattan Railway Company of an aggregate par value of $1,088,000, as follows:

a. Interborough Rapid Transit Company First and Refunding 5% Gold Bonds of the par value of $54,000.

b. Interborough Rapid Transit Company Ten-Year 6% Gold Notes of the par value of $201,000.

c. Manhattan Railway Company 7% Guaranteed Stock of the par value of $56,000.

d. Manhattan Railway Company Modified Stock of the par value of $530,000.

e. Manhattan Railway Company Consolidated Mortgage 4% Bonds of the par value of $243,000.

f. Manhattan Railway Company Second Mortgage Bonds of the par value of $4,000.

2. Petitioner Kay Realty Co., Inc., is a corporation organized and existing under the laws of the State of New York and is a taxpayer of the City of New York. Its real property is assessed at an amount in excess of $1,000, and it has paid tax thereon within the last twelve months.

3. Individual petitioners are users of both subway and elevated lines now operated by the Interborough Rapid Transit Company, or its Receivers, in the City of New York.

4. On or about the 26th day of August, 1932, The American Brake Shoe and Foundry Company, the plaintiff herein, filed in this Court its Bill of Complaint against the Interborough Rapid Transit Company, defendant herein, as a general creditor, and thereupon Victor J. Dowling and Thomas E. Murray, Jr., of the City of New York, were by order of Hon. Martin T. Manton, United

States Circuit Judge designated to hold a District Court, appointed temporary receivers for Interborough Rapid Transit Company. On or about September 2, 1932, Manhattan Railway Company petitioned herein for the extension of the receivership and for the appointment of a separate receiver of itself and of its property. By an order dated September 6, 1932, Judge Manton appointed William Roberts of the City of New York temporary receiver for Manhattan Railway Company. By order dated September 28, 1932, Judge Manton continued Victor Dowling and Thomas E. Murray, Jr., as receivers for Interborough Rapid Transit Company and William Roberts as receiver for Manhattan Railway Company.

All documents filed in the above-entitled cause are hereby referred to and for that purpose, and, albeit without admitting the truth of any allegations of fact therein contained, the same are hereby incorporated herein and made a part of this petition.

5. Numerous questions of vital and far-reaching importance in so far as they affect the interests of the petitioners have been, and on information and belief will be, raised in the above-entitled cause and come before this Court for its decision therein. Your petitioners refer to the evidence already taken herein and to the allegations contained in documents filed herein and to oral and written arguments made herein, from all of which the interests of the petitioners, and persons similarily situated, are apparent.

6. Heretofore no persons have intervened herein to protect the interests of taxpayers of the City of New York, nor the interests of users of transit lines in the City of

New York. The City of New York itself has not been made a party, nor has it intervened or taken any steps or action herein, although urged to do so, and although its interest in the Interborough-Manhattan properties and their operation is far greater than that of all the security holders combined. The Transit Commission has not been made a party herein, nor has it intervened or taken any steps or action herein. The City of New York and its taxpayers and the users of transit lines in the City of New York, are interested in this action and in this receivership, among other reasons, because:

(1) The rights of the City of New York under the agreements referred to in the record herein as Contracts Nos. 1, 2 and 3 and Amendments and modifications thereof and under the Elevated Extension Certificate and the franchises of Interborough Rapid Transit Company are seriously involved in the matter of the adoption or rejection by the Interborough Receivers of the lease referred to in the record herein as the Manhattan Lease.

(2) The City of New York has an investment in the property in the hands of the receivers herein in excess of $150,000,000.

(3) There is claimed to be due and owing to the City of New York $1,500,000 on account of real estate and special franchise taxes.

(4) The right of users of rapid transit lines in the City of New York to a continuous trip in the same general direction over the lines of Interborough Rapid Transit Company and Manhattan Railway Company, at a single fare of five cents, and the right to a trip

wholly within the lines of Manhattan Railway Company at a five-cent fare are seriously involved and threatened in the matter of the adoption or rejection by the Interborough Receivers of the lease referred to in the record herein as the Manhattan Lease.

7. For some time past the officials of the Interborough Rapid Transit Company and of the Brooklyn-Manhattan Transit Company, which also operates rapid transit lines in the City of New York, have been conducting negotiations with representatives of the City government with respect to a sale of all the rapid transit lines to the City of New York, the City thereupon to operate a unified system. This proposed sale involved payments to each class of security of Interborough and Manhattan.

8. Petitioners believe that the best interest of all classes of Interborough and Manhattan security holders, taxpayers and riders is "unification"; that unification is most likely to be consummated by preservation of the integrity of the Interborough system as presently operated, and that unification may be retarded or prevented if the system disintegrates.

9. Petitioners believe that disaffirmance of the Manhattan Lease will give to the City of New York the right to declare a breach of Contracts Nos. 1 and 3 and the Elevated Extension Certificate. If this were done, security of the Interborough 5% Bonds would be jeopardized, and the position of Manhattan securities seriously impaired.

10. Committees have been formed to represent the separate interests of the various classes of securities held by

petitioners other than Manhattan Second Mortgage Bonds, and such committees, other than the committee for the Manhattan Modified Stock, have been permitted to intervene herein. Petitioners are not satisfied with such representation. Said committees are striving for what is believed to be the special interest of one class of security as opposed to the others. Representation should be given to a group interested not so much in such special interest, but in the common advantage to taxpayers, riders and security holders in the adoption of unification. The committees for the Interborough 5% bonds and 7% notes favor unification but are opposing the continuance of the integrity of the Interborough system.

11. Petitioners believe and allege that many persons, like them, are holders of not merely one class of Interborough or Manhattan securities, but of a number of classes, and are consequently more interested in a solution of the problem as a whole, rather than the special advantage of a particular security. Such persons should be given representation. The granting of this petition would effect that result.

12. At the present time the committee for Manhattan Modified Stock has not intervened herein. This is the class of security of which petitioners hold the largest amount. In so far as this part of their holdings is concerned petitioners are not represented at all by any intervener now in the suit.

13. Your petitioners allege that, in view of the importance to them of the questions which are now before

this Court and which will from time to time arise in this cause, they should be permitted to intervene in this cause.

WHEREFORE, your petitioners pray that an order be entered herein permitting your petitioners to intervene as a party defendant in this cause with the right to plead and to be heard on all matters arising in this cause, and that your petitioners be entitled to notice of all proceedings herein and for such other, further, different and additional relief as to this Court may seem just and proper. And your petitioners will ever pray.

Dated, New York, N. Y., December 19th, 1932.

WILLIAM GRAVES SMITH,
WILLIAM L. WHITE,
E. R. RITCHIE,
SOL G. SALOMON,
MARCEL H. STIEGLITZ,
KAY REALTY CO., INC.,

By M. S. REISMAN,
V-President.

SAMUEL UNTERMYER,
CHARLES DICKERMAN WILLIAMS,
Counsel.

---

IRA W. HIRSHFIELD,
Solicitor for Petitioner,
521 Fifth Avenue,
New York.

STATE OF NEW YORK,
COUNTY OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK, } ss.:

WILLIAM GRAVES SMITH, being duly sworn, deposes and says:

I am one of the petitioners herein. I have read the foregoing petition and the same is true to the best of my knowledge, information and belief.

WILLIAM GRAVES SMITH.

Sworn to before me this
19th day of December, 1932.

WILLIAM C. MORRIS,
Notary Public,
Kings County.
Kings Co. Clerk's No. 880, Register's No. 3505.
Cert. filed in N. Y. Co. Clk's No. 1149, Reg's No. 3M733.
Cert. filed in Westchester Co. Clerk's & Register's.
Commission expires March 30, 1933.

**EXHIBIT C**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.* | In Equity No. E 70-364 |
| CENTRAL HANOVER BANK & TRUST COMPANY, as Trustee, *Plaintiff,* *against* MANHATTAN RAILWAY COMPANY, *et al.,* *Defendant.* | Consolidated Cause E 77-271 |
| CENTRAL HANOVER BANK & TRUST COMPANY, as Trustee, *Plaintiff,* *against* MANHATTAN RAILWAY COMPANY, *et al.,* *Defendant.* | Accounting Action E 71-211 |

**MEMORANDUM ON BEHALF OF SIDNEY WASSNER, *ET AL.*, COMMITTEE FOR MANHATTAN SECOND MORTGAGE BONDS, IN SUPPORT OF PETITION FOR LEAVE TO INTERVENE.**

The petition to intervene alleges grounds for intervention of right under two clauses of Rule 24a of the Federal Rules of Civil Procedure. (1) The allegation with reference to the issue of affirmance by Interborough's Receiver of the Manhattan lease sets forth grounds for intervention under clause "2" of that rule; they, together with the history of these proceedings, with which the Court is already familiar, show that "the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action". (2) The allegations in paragraph "Eighth" of the petition as to the invalidity of the pledge of Interborough bonds to secure Interborough's 7% noteholders show grounds for intervention under clause "3" of that rule; they show that "the applicant is so situated as to be adversely affected by distribution or other disposition of property in the custody of the Court or an officer thereof", which distribution is imminent under the "Plan of Unification" which has heretofore been brought to the Court's attention.

The class represented by the petitioners is not a party to these proceedings and is not presently represented in them and has not been represented throughout the negotiations of the "Plan of Unification". It has at last become obvious that their interests have not been, and are not being, adequately represented by reason of the fact that the issue as to affirmance of the Manhattan lease has quite evidently been abandoned by the Trustee under the mortgage, the Manhattan Receiver, and the company itself, and by reason of the fact that all of these parties have agreed to, or not dissented from, the provision in the "Plan of Unification" allocating to these bondholders 50% of the face value of their bonds, which figure could be conscionable only on

the hypothesis that the lease must be disaffirmed. The neglect of petitioners' interest is also apparent from the fact that more than seven years have now elapsed without final disposition of these primary and fundamental issues in these proceedings, and nearly seven months have elapsed since the Circuit Court of Appeals rendered its decision which was tantamount to a direction that the lease be affirmed. Petitioners insist that they have the right, in view of the dereliction of the other parties, to either compel the affirmance of the lease, or in the alternative, to negotiate a modification of the terms of the "Plan of Unification" with the hypothesis of disaffirmance omitted.

Regardless of whether petitioners might have any standing to object in an isolated action to foreclose on the bonds pledged by Interborough to secure 7% notes, they certainly have such standing in the present situation where a lump sum price is to be paid for the assets in the receiverships and a mis-allocation of a part thereof based upon a mis-classification, is likely to be at the expense of the petitioners and, furthermore, as creditors of Interborough, petitioners have a right to prevent a dissipation of its assets to their detriment.

This application is timely. The issue of disaffirmance is still before the Court and the issue as to the validity of the bonds may still be contested in the foreclosure action. The fact that the receivership has been in existence for over seven years has no bearing whatever on the question of timeliness. The petitioners do not seek to attack any of the decrees or proceedings heretofore had in the receivership. Neither is the petition made for the purpose of delaying the proceedings or "to create a maneuvering value in their bonds". It has for its sole purpose the protection of

the clear rights of all Manhattan Second Mortgage bondholders.

A criticism of the pleading incorporated in the petition was voiced upon the argument of the application to the effect that petitioners had adopted a pleading the effect of which was to cut off all their interest in the receivership estates. The pleading referred to is the bill of foreclosure of the Trustee of the Manhattan First Mortgage. The petition clearly limits the adoption of that pleading to the common purpose expressed therein and asserted in the petition to compel affirmance of the lease and the curing of the defaults on the first mortgage. It is submitted that petition sets forth "a short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for judgment for the relief to which he deems himself entitled" as required by the rules.

Several of the parties to these proceedings filed answers to the petition and urged as one of the chief reasons for denial of intervention that petitioners are already adequately represented. It is to be noted, however, that the parties claimed to be adequately representing the petitioners filed no answers and made no such claim and thus assumed no responsibility for the urging of the claims set forth in the petition. Where the facts as to inaction on the part of the Trustee and the Receiver with reference to the said issues are well known to the Court and are apparent in the record it should not be necessary to show collusion, fraud, or other misfeasance in order to further demonstrate the inadequacy of the petitioners' representation.

It would serve no useful purpose to cite precedents as to the right to intervention since each case must be decided upon its own facts and it would be difficult indeed to find a case in which the facts parallel those in this case. There

have been only two or three decisions on this point under the new rules and none of them has any similarity to this case. It is submitted, however, that one of the purposes of the new rules was to broaden the right to intervene and generally to cut away the grounds for the long existing criticism of federal receiverships. Such criticism was well summarized in a recent note in the *Yale Law Journal, Vol. 47, Page 746 (March 1938)* to the following effect:

> "The Equity receivership inaugurated as an extraordinary remedy for corporations unable to pay their debts as they mature has long been criticized as an effective vehicle for the machinations of dominant banker-management groups. Assisted by such carefully secured aids as a friendly court, a few obliging creditors, and puppet protective committees, these groups have succeeded in maneuvering the most complicated corporate structures through the intricacies of the modern reorganization, often with little or no concern for the interests of investors at large. Nor have the receivership courts exhibited any marked inclination to insist upon the protection of minority rights, for the very complexity of the plans commonly presented for review has militated against any thoroughgoing analysis of the issues at stake. Pressed by the exigencies of judicial business and conscious of the practical necessity of consummating some sort of reorganization, the lower courts, at least, have tended to stamp with their approval any plan which could obtain the requisite number of consents and which promised an end to tedious litigation."

It would seem clear clear that one of the purposes of Rule 24 is to break the hold of "puppet protective committees" upon receiverships and permit the "investors at

large" to be heard. In a report growing out of an investigation by the Securities and Exchange Commission into the question of the extent and adequacy of representation by trustees in receiverships the following conclusion was given:

> *Report of the Counsel to the Special Committee, 74th Cong., 2d Sess. Sen. Doc. No. 268 (1936) (McAdoo Committee) 27:*
>
> "The obvious result of discouraging intervention and shifting objection is to weld the circle of collusion that surrounds the judge."

It is submitted that another of the purposes of Rule 24 is, and rightly should be, to forestall this welding process.

With reference to the measure of representation of bondholders' interests by trustees it has been well, and so far as these proceedings are concerned prophetically said "the so called corporate trustee has most often been distinguished by its inactivity, which, whether it is justifiable inactivity or not, should not stand as a barrier against the admittance of the secured creditors into the proceedings". (47 Yale Law Journal, 898, *Moore* v. *Levi* on Federal Intervention.)

## CONCLUSION

Petitioners should be granted intervention of right to represent all Manhattan Second Mortgage Bondholders who care to join them for the following purposes:

1. To be heard upon the submission of the "Plan of Unification" for the approval of the Court and upon any proceeding to fix an upset price.

2. For the purpose of taking such action as may be necessary to compel affirmance by the Interborough Receiver of the Manhattan lease and compelling the making of payments required by the lease.

3. To put in issue the question of the validity of the Interborough bonds pledged to secure Interborough's 7% notes in order to preserve Interborough's estate and recover for that estate interest payments on those bonds heretofore conditionally authorized by the Court in the total amount of over $17,000,000.00.

Respectfully submitted,

ROBERT E. CONNOLLEY, Esq.
Attorney for Petitioners
Office & P. O. Address
36 West 44th Street
Borough of Manhattan
City of New York

No. 811 1122

DEC 23 1941

CHARLES ELMORE CROPLEY

# Supreme Court of the United States

October Term.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
*Plaintiff,*

*against*

INTERBOROUGH RAPID TRANSIT COMPANY,
*Defendant.*

---

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee,
*Plaintiff,*

*against*

MANHATTAN RAILWAY COMPANY, *et al.*,
*Defendants.*

---

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *et al.*,
*Plaintiffs,*

*against*

INTERBOROUGH RAPID TRANSIT COMPANY, *et al.*,
*Defendants.*

---

SOLOMON G. SALOMON, for himself,
*Appellant,*

*against*

VAN S. MERLE-SMITH, *et al.*, J. P. MORGAN, *et al.* and J. HERBERT CASE, *et al.*, Contracting Committees, THE CITY OF NEW YORK, the TRANSIT COMMISSION and all other parties to Plan and Agreement to end the receivership of Interborough and Manhattan Companies. THOMAS E. MURRAY, as Interborough Receiver, and WILLIAM ROBERTS, Receiver of Manhattan Railway Company,
*Appellees.*

---

**Motion to Make the Stipulation, dated on or about November 25, 1941, between Counsel for Paul E. Manheim, an Appellant in the Above Entitled Causes, and Counsel for Van S. Merle-Smith, *et al.*, and Others, Appellees, in Respect to the Record in Connection with Petition for Writ of Certiorari in the Above Entitled Causes, the Order of the Supreme Court of the United States.**

---

SOLOMON G. SALOMON, *pro se*,
18 Pine Street,
Woodmere, N. Y.

# Supreme Court of the United States

October Term.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
*Plaintiff,*

*against*

INTERBOROUGH RAPID TRANSIT COMPANY,
*Defendant.*

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CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee,
*Plaintiff,*

*against*

MANHATTAN RAILWAY COMPANY, *et al.*,
*Defendants.*

---

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *et al.*,
*Plaintiffs,*

*against*

INTERBOROUGH RAPID TRANSIT COMPANY, *et al.*,
*Defendants.*

---

SOLOMON G. SALOMON, for himself,
*Appellant,*

*against*

VAN S. MERLE-SMITH, *et al.*, J. P. MORGAN, *et al.* and J. HERBERT CASE, *et al.*, Contracting Committees, THE CITY OF NEW YORK, the TRANSIT COMMISSION and all other parties to Plan and Agreement to end the receivership of Interborough and Manhattan Companies, THOMAS E. MURRAY, as Interborough Receiver, and WILLIAM ROBERTS, Receiver of Manhattan Railway Company,
*Appellees.*

---

**Motion to Make the Stipulation, dated on or about November 25, 1941, between Counsel for Paul E. Manheim, an Appellant in the Above Entitled Causes, and Counsel for Van S. Merle-Smith, *et al.*, and Others, Appellees, in Respect to the Record in Connection with Petition for Writ of Certiorari in the Above Entitled Causes, the Order of the Supreme Court of the United States.**

*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Comes now, Solomon G. Salomon, Appellant in the above entitled causes and shows:

1. That a stipulation was entered into, on or about November 25, 1931, between the other Appellant in the entitled causes, Paul E. Manheim, according to an agreement with the representatives of the Corporation Counsel of the City of New York, Counsel for Van S. Merle-Smith *et al.*, and others;

2. That said stipulation was entered into and then submitted to your petitioner herein for signature;

3. That your petitioner herein offered to sign said stipulation if same were to be presented to this Honorable Court to be "so ordered" by a Justice or the Justices thereof;

4. That said stipulation was filed with the Clerk of the Court;

5. That in accordance with your petitioner's desire to act correctly in all matters, he has annexed hereto as an appendix true copies of the correspondence in connection with said stipulation;

Wherefore, petitioner respectfully moves the Court to make said stipulation the order of the Court, or, in the event it is not necessary, and mere filing of the stipulation was sufficient, that he, petitioner, be so advised; and petitioner respectfully asks that such further relief be granted to him in the premises, as is lawful and just.

Respectfully submitted,

SOLOMON G. SALOMON,
18 Pine Street,
Woodmere, N. Y.

## APPENDIX

SIMPSON THACHER & BARTLETT
120 Broadway
New York

October 23, 1941

Re *Paul E. Manheim, et al., Appellants* v. *Van S. Merle-Smith, et al., Appellees, in the United States Circuit Court of Appeals for the Second Circuit.*

The Honorable Charles Elmore Cropley,
Clerk of the Supreme Court of the United States,
Supreme Court House,
Washington, D. C.

*Dear Sir:*

In connection with the above named case, we are forwarding to you, under separate cover, a certified transcript of the Record in the Circuit Court of Appeals for the Second Circuit, together with ten copies of the Record as printed for the court below.

We call to your attention the fact that the Circuit Court of Appeals had before it many thousands of pages of printed and photostated documents in addition to the two printed volumes certified as the transcript by the Clerk of the Circuit Court of Appeals. Only three copies of these documents were furnished the Circuit Court of Appeals pursuant to permission granted under its rules. We, of course, understand that if certiorari is granted the rules of the Supreme Court require the printing of such of these documents as counsel do not agree to omit by stipulation, but we have been informed by the Clerk of the Circuit Court of Appeals for the Second Circuit that we need not

file any copies of these documents in connection with the proposed petition for certiorari. We would appreciate your confirming the correctness of this statement. In passing, we would like to mention that even furnishing ten copies of the documents would be a very expensive and arduous task because of the number of photostats which would be necessary plus the number of printed documents of which less than ten copies are available.

We have also been informed by the Clerk of the Circuit Court of Appeals for the Second Circuit that the three-month period within which the petition for certiorari must be filed runs from the date of the order of the Circuit Court, that is September 23, 1941, and not from the date of the decision which was rendered on August 12, 1941. This result follows, he said, even though the decision affirming the District Court in all respects without costs was completely self-executing and although the delay in entering the formal order was caused by a motion of one of the other appellants to reargue the case, in which motion our client did not join. We would also appreciate your confirming the views of the Clerk of the Circuit Court of Appeals in this respect.

Please furnish us, at your convenience, with an estimate of the cost of printing the additions to the Record necessary to show the proceedings in the Circuit Court of Appeals and for supervising the printing thereof. Because of the large number of parties, 65 copies will be required in lieu of the usual 40. On receipt of a memorandum of your charges, we will see that they are paid promptly.

Very truly yours,

SIMPSON THACHER & BARTLETT.

SIMPSON THACHER & BARTLETT
120 Broadway
New York

October 29, 1941.

Solomon G. Salomon, Esq.,
18 Pine Street,
Woodmere, Long Island,
New York.

Dear Mr. Salomon:

I enclose a photostat of a letter received from the Clerk of the United States Supreme Court in reply to a letter of which I previously sent you a copy.

I talked with Mr. Gaud over the telephone on the question of the exhibits and he was agreeable to my suggestion of filing two copies of the exhibits in Washington pursuant to stipulation, thereby by-passing the question of whether they are in reality exhibits or what the Clerk refers to as "part of the record", and retaining in our possession a set available for use.

In connection with the petitions for certiorari, we have incurred charges for certifying the record in the amount of $10.20 and we are about to pay the deposit of $115 mentioned in the letter of the Clerk. We would greatly appreciate your paying half of these amounts at this time since our client is urging us to collect from you one-half of the charges in the Supreme Court and as much as possible of the printing expense incurred in the Circuit Court of Appeals.

Very truly yours,

WALTER E. BEER, JR.

(Enc.)

OFFICE OF THE CLERK,

SUPREME COURT OF THE UNITED STATES,

WASHINGTON, D. C.

October 27, 1941

Simpson, Thacher & Bartlett, Esquires
New York, New York

Gentlemen:

I have your letter of October 23d, together with the original and ten additional copies of the record in the case of *Manhein* v. *Merle-Smith.*

I estimate that a deposit of $115.00 will be required to print the appellate proceedings and to docket the case. Upon the receipt of this deposit the necessary printing will be undertaken and you will be furnished with one complete copy of the record. Kindly advise me as to how many copies of the printed Circuit Court of Appeals proceedings you desire.

I believe the Clerk of the Circuit Court of Appeals is correct in his assertion that the time for filing your petition runs from the date of the order for mandate, September 23d, rather than from August 12th. The order for mandate issued in the Second Circuit is tantamount to a judgment and until such order is entered there is nothing for this Court to review.

I am not altogether clear on the matter of the printed photostatic documents mentioned in your letter. If these were original exhibits they may be forwarded to this office

and referred to in your briefs and argument, and it will not be necessary that they be printed. They will be returned to the Clerk following the final disposition of the case by this Court.

If the papers referred to are in reality a part of the record then it will be necessary that they be printed or a stipulation of counsel entered into providing that they need not be re-printed. In any event they should be before the Court upon its consideration of the petition for certiorari rather than waiting until the petition is granted.

Yours truly,

CHARLES ELMORE CROPLEY, Clerk

By E. P. CULLINAN
E. P. Cullinan
Assistant

EPC:EG

SIMPSON THACHER & BARTLETT
120 Broadway
New York

November 25, 1941

*Manheim, et al.* v. *Merle-Smith, et al.*

Solomon G. Salomon, Esq.
18 Pine Street
Woodmere, L. I., N. Y.

Dear Mr. Salomon:

A stipulation has been signed by all the attorneys for the parties to the above entitled proceeding agreeing to the filing of two copies of exhibits used in the Circuit Court of Appeals in the Supreme Court of the United States in lieu of having any of them reprinted.

I should appreciate your dropping in at our office for the purpose of signing the stipulation at your convenience, or if that is not convenient your telling me where I might send the stipulation to you to have it signed.

Sincerely yours,

WALTER E. BEER, JR.

18 Pine Street
Woodmere, New York
November 26, 1941

Simpson, Thacher & Bartlett
Att. Mr. Walter E. Beer, Jr.
120 Broadway
New York City

My dear Mr. Beer:

I have your letter of November 25. Before answering same, I want to expain that I have not been entirely well and have not been in the City except once, and for only a short time, since I saw you last.

IN RESPECT TO THE STIPULATION; I am willing to sign same if the intention is to have it approved by one of the judges and thereby made the order of the Supreme Court.

You will remember that our adversaries promised to supply ten sets of the exhibits if we should find it necessary to petition for certiorari. My recollection is that you have complete sets or almost complete sets so that binding eight more should not be too onerous.

It seems to me and, as you know, I have always complained that the adversaries stuffed the record with unnecessary exhibits. I think the proper course at this time may be to reach an agreement as to the exhibits that are actually required for determination of the matters involved. I do think it desirable that the court have available sufficient exhibits to determine whether or not this case is of such nature that, lawfully and justly, it should be reviewed by the Supreme Court.

I happen to know that our adversaries have enough available material to complete the needed exhibits.

Very truly yours,

SOLOMON G. SALOMON

SGS:HED

SIMPSON THACHER & BARTLETT

120 Broadway

New York

November 29, 1941.

*Re Manhattan-Interborough Matter*

Solomon G. Salomon, Esq.,
18 Pine Street,
Woodmere, Long Island

Dear Mr. Salomon:

This is to acknowledge receipt of your letter, dated November 26, 1941. I can well understand your desire to have my client go to additional expense and to have this firm do more work at no expense whatever to you. Nevertheless, I have decided to send the stipulation to the Supreme Court Clerk without your signature.

Very truly yours,

WALTER E. BEER, JR.

18 Pine Street
Woodmere, New York
December 4, 1941

Simpson Thacher & Bartlett
Att. Mr. Walter E. Beer, Jr.
120 Broadway
New York City

My dear Mr. Beer:

I received your lines of November 29, in due time, but have allowed myself a cooling-off period before answering.

I don't understand your mental process when you say—you can well understand my desire to have your client go to additional expense and make your firm do more work at no expense, at all, to me. It seems to be a wise precaution, even if it were not the rule, to have any stipulation we enter into with our opponents, made the order of the Court as we have done previously.

Who are we to presume that exception to the rule should be made for us? Is it that you question the wisdom of the rule? In fact, how much is the expense you speak of?

You had drawn the stipulation before you wrote to me on November 25; all you asked was that I drop in to sign. To this I replied, "IN RESPECT TO THE STIPULATION; I am willing to sign same if the intention is to have it approved by one of the judges and thereby made the order of the Supreme Court".

You say, "Nevertheless, I have decided to send the stipulation to the Supreme Court Clerk without your signature".

Do you mean by this that it is not necessary to have one or some of the judges approve your stipulation?

In my appeal to the C. C. A., I appealed from the termination of the receivership. As I see it, the correct termination is the most important administrative act in any receivership. To put it mildly, I don't understand how there could have been any doubt in your mind that the "Unification Statute" does not authorize the winding up of any receivership.

I explained to you time and again that, (1) all the statute did was to authorize the City to acquire property; (2) nothing could stop the foreclosure of the Interborough mortgage; but, (3) for the many and various reasons I explained to you, the foreclosure of the Manhattan Consolidated mortgage was not lawfully and equitably feasible. I, also, explained to you, time and again, at length, and certainly courteously, that on March 15, 1940, Manhattan Company was undoubtedly solvent.

Even though you agreed with me, you obdurately refused to make your appeal coincide with mine. Even though it was self-evident that you didn't need to argue in the circuitous manner you chose, because the tail goes with the hide, you insisted that you would, nevertheless, not dispute the legality of the foreclosure and, nevertheless, would be safe. The result was that which you are well aware of.

I thought it was tacitly understood that you knew I had saved your bacon, because I covered over the interests of the Second Mortgage Bonds by reason of my firm stand, not only in respect to them, (my smallest interest), but because of my interest in face amounts of $47,000 First Mortgage Bonds and $56,000 of Guaranteed Stock.

I need to know what you mean by the last sentence of your letter of November 29. Do you insist that it is not

necessary to have a judge of the Court, rather than the Clerk, have cognizance of and approve the stipulation?

I lent you, among other documents, the motion passed upon by Judge Reed to postpone consideration of the aborted petition and cross-petition in *Murray* v. *Roberts*. I cannot for the life of me see where that motion differs, in any way whatsoever, nor as to what is necessary in the case of your stipulation.

Very truly yours,

SOLOMON G. SALOMON.

SGS:HED

18 Pine Street
Woodmere, New York
December 9, 1941

Simpson Thacher & Bartlett
Att. Mr. Walter E. Beer, Jr.
120 Broadway
New York City

My dear Mr. Beer:

I was sorry to have been compelled to write to you, on December 9th, ult., setting forth what needed to be said because of your letter of November 29th.

I hope you will now understand, I have no desire to have your client go to additional expense nor to have your firm work for me at no expense whatever to me. I will explain this further hereinafter.

I hope you will now also understand your closing sentence was unjustified, because I had clearly stated my willingness to sign the stipulation, if it was to be made the Order of the Court, through approval thereof by one of the Justices.

I do not intend to be tricked by the Respondents into believing the mere stipulation, without judicial approval, suffices to suspend the rule that ten (10) copies of the exhibit-items must be furnished with the required Record and other data, such as briefs, etc. As I pointed out in my letter, there should be no difficulty in obtaining sufficient material to make up eight (8) additional sets of the required material—i.e., exhibits. I pointed out at the same time, that an abridgement of the Record seemed to be in order at the present time; and that when this is done, it will be child's play to bind them together, and certainly

not expensive, and to tab them, so as to be handy for examination by the Justices.

I think it would be an imposition upon the Supreme Court not to abridge the Record, insofar as the exhibits are concerned, and expect the Justices to wade through the mass of exhibits in the several volumes that constitute the present unabridged Record.

I happen to know that such unwarranted procedure was attempted in the Gilcrist case, (279 U. S. 159), which is the direct antecedent of the Fare Case, (257 N. Y. 20), and that the Record was sent back for abridgement before the Court would hear the matter. I certainly do not wish to present myself to the Supreme Court in such light, and, I hope, you will see that I was not looking for anything that is not as beneficial to you as to myself.

Returning now to the question of whether you have been working for me, I ask that you give consideration to the following which, I think, are abundantly clear on the record of things to the present:

FIRST—On page 208 of the C. C. A.'s Opinion of August 12th last, it "hangs its hat" on the proposition that you do not question the transfer of the Manhattan property to the City via Article Two (2) of the Plan. The Opinion, very clearly, continues on that note, up to the closing paragraph on page 2017, and then evades the questions raised by my appeal, by saying these are answered in disposing of your appeal. As I see it, they either didn't read my brief or were purposely evading it.

SECOND—If you will read Mr. Gutman's and my record before Judge Patterson, (R., Vol. II, pp. 879-87, March 6, 1940), you will see that both of us objected to the fore-

closure of the Consolidated Mortgage and claim that it was invalid, and similarly, that the so-called Compromise of Claims and Establishment of the "Settlement Fund", via Article Five (3) of the Plan, was invalid. Same inevitably leads to the fact that the Plan is not feasible as a matter of law.

THIRD—My appeal and brief in the C. C. A. was expressly and distinctly to the same effect.

FOURTH—Under the doctrine in *Bogert* v. *So. Pac. Co.*, (250 U. S. 483, 489), referred to on page six (6) of my Reply Brief, I preserved your case. That is what I meant by saving your bacon.

In view of the said four things, it seems to me that I have been working for you and your client as well as myself, and not that you have done anything for me, so far as worthwhile work is concerned.

I need to know, for obvious reasons, whether or not the stipulation was sent to Washington to have it made the Order of the Court. Certainly, I am entitled to that information. I, therefore, in good humor and in good faith, but nevertheless firmly, request an immediate reply.

Sincerely yours,

SOLOMON G. SALOMON

SGS:HED

SIMPSON THACHER & BARTLETT
120 Broadway
New York

December 10, 1941.

Solomon G. Salomon, Esq.,
18 Pine Street,
Woodmere, Long Island,
New York.

Dear Mr. Salomon:

In reply to the last paragraph of your letter of December 9, 1941, I wish to state that the stipulation to which you refer was sent to us but no instructions were given to have it made the order of the Supreme Court of the United States. The procedure followed was suggested by the Clerk of the Supreme Court.

I am returning to you herewith the briefs and petitions for certiorari in the case of *Murray* v. *Roberts* which you previously sent me.

Very truly yours,

WALTER E. BEER, JR.
A. L.

(Encs.)

(11C)

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941—No. 811.

SOLOMON G. SALOMON,

*Petitioner,*

*against*

VAN S. MERLE-SMITH, *et al.*, J. P. MORGAN, *et al.*, and J. HERBERT CASE, *et al.*, Contracting Committees, THE CITY OF NEW YORK, the TRANSIT COMMISSION and all other parties to Plan and Agreement to end the receivership of Interborough and Manhattan Companies, THOMAS E. MURRAY as Interborough Receiver and WILLIAM ROBERTS, Receiver of Manhattan Railway Company,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.


WILLIAM C. CHANLER,
*Corporation Counsel,*
*Attorney for The City of New York.*

WILLIAM S. GAUD, JR.,
*Of Counsel.*

CHESTER W. CUTHELL,
*Special Counsel to the Transit Commission.*

ROBERT W. MALONEY, JR.,
*Of Counsel.*

BOYKIN C. WRIGHT,
*Solicitor for Van S. Merle-Smith and others as a Protective Committee for Manhattan Railway Company Consolidated Mortgage 4% Gold Bonds.*

CLIFTON MURPHY,
DANIEL JAMES,
*Of Counsel.*


This brief is joined in by parties whose names appear on pages 8 and 9.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941.

No. 811.

SOLOMON G. SALOMON,
*Petitioner,*

*against*

VAN S. MERLE-SMITH, *et al.*, J. P. MORGAN, *et al.*, and J. HERBERT CASE, *et al.*, Contracting Committees, THE CITY OF NEW YORK, the TRANSIT COMMISSION and all other parties to Plan and Agreement to end the receivership of Interborough and Manhattan Companies, THOMAS E. MURRAY as Interborough Receiver and WILLIAM ROBERTS, Receiver of Manhattan Railway Company,
*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### Preliminary Statement.

This petition is filed by Solomon G. Salomon, a layman who appears in this proceeding as his own counsel.*

* The Court will note that this petition arises out of the same proceedings as does that now before the Court in *Manheim* v. *Merle-Smith*, No. 806, October Term, 1941. We repectfully refer the Court to the brief submitted in opposition to the *Manheim* petition for a statement of the facts and circumstances out of which the present *Salomon* petition arose.

Salomon has appeared throughout the receivership proceeding, from time to time presenting his views of various divergent interests. He has been in this litigation almost from the outset, and has taken advantage of every opportunity to present his personal views on almost every issue which has arisen. Despite the fact that the different interests have been ably represented by counsel throughout the receivership proceedings, Salomon at one time or another has been in disagreement with them all. When satisfied with the results obtained, he has even made vocal his dissatisfaction with the method of attaining them. On numerous occasions he appealed to the Circuit Court of Appeals, and he has also attempted to come to this Court. He has yet to achieve success in any Court.

The record does not disclose what securities Salomon now owns, or in what capacity he has filed his present petition. At one time or another he has claimed to be the owner of both Interborough and Manhattan securities. At the time of his appeal to the Court below, he apparently held certain Interborough securities, as well as $47,000 principal amount of Manhattan Consolidated Mortgage Bonds, $11,000 principal amount of Manhattan Second Mortgage Bonds, and 560 shares of Manhattan Guaranteed 7% Stock. However, as he himself disclosed in a reply brief submitted in the Court below, he sold, at some time prior to the submission of that brief, $46,000 principal amount of his Consolidated Mortgage Bonds and 50 shares of his Guaranteed 7% Stock. Whether he has sold any further securities since that time we do not know.

## The Petition.

### (1)

From a reading of the petition, it is exceedingly difficult to determine precisely what relief Salomon seeks. As we analyze his petition, he seems to be once more arguing the same subject which he has been arguing at every opportunity throughout the receivership, namely, his own personal views as to the issue of disaffirmance of the Manhattan lease. That question seems to be the focal point of all his discussion.

Admittedly, the disaffirmance issue was of fundamental importance in the entire receivership. However, Salomon has been insistent upon having its intricate and complicated issues tried and re-tried upon every collateral matter which has arisen. His dissatisfaction throughout the receivership seems to have been based upon a failure of the courts to adopt his own personal views of the law governing disaffirmance. For example, when the Sixth Avenue Elevated Line was sold in foreclosure because of tax defaults of over $9,000,000, Salomon's views on the disaffirmance issue were again brought forward and presented to both the District Court and the Circuit Court of Appeals as a bar to the sale. *Manhattan Railway Company* v. *Central Hanover Bank and Trust Company,* 99 F. (2d) 789, 793 (1938), certiorari denied, 306 U. S. 641 (1939).

### (2)

Presumably, Salomon intends to bring up by this petition the issue of the legality of the Unification Plan. He seemingly takes the position that the Plan was not legal because the disaffirmance issue was not properly decided. But the disaffirmance case was decided by the Circuit Court

of Appeals in *Murray* v. *Roberts,* 103 F. (2d) 889 (1939), petition for certiorari dismissed per stipulation, 311 U. S. 720 (1940). The time for applying to this Court for a review of that case has passed. Salomon cannot now attack collaterally the correctness of that decision, which constituted the basis upon which the Unification Plan was negotiated and carried out.

In connection with his assertions concerning the disaffirmance issue, Salomon adverts in several places to Section 24 of the New York Rapid Transit Act. We think it necessary here to do no more than point out that the interpretation of Section 24 was only one of many phases of the disaffirmance litigation; that the interpretation of this section was by no means the simple matter Salomon indicates, as will be shown by a reading of the decisions of the courts below; that the interpretation of this section for purposes of the present case has been finally determined by the disaffirmance decision of the Circuit Court of Appeals, on which the time to seek certiorari has expired; and that, in any event, this unique state statute, with its localized application and with a vanished subject matter, could not possibly be of sufficient public interest to warrant a review of its interpretation by this Court.

Salomon also takes exception to numerous other orders and decrees which were entered in the receivership proceedings over the past eight years, and which, having been improperly decided according to his view, would make illegal any Unification Plan that was adopted. In other words, he seeks not only to upset the Unification Plan upon grounds which are utterly irrelevant and without substance, but also to persuade this Court to grant a writ of certiorari to review many orders and decrees as to which no right to petition for a writ now exists.

Thus, although the entry of the orders and decrees relating to unification furnished a pretext for the filing of his petition, the petition actually constitutes an attack upon the many orders and decrees with which Salomon has been dissatisfied, which were entered from the beginning of the receivership.

**(3)**

Illustrative of Salomon's dissatisfaction with the conduct of the receivership proceedings as a whole, is the intemperance of the language which he uses to describe the conduct of those proceedings. His petition makes only too clear his conviction that both the District Court and the Circuit Court of Appeals deliberately and calculatingly mismanaged the receivership estates. To cite only a few instances of his lack of restraint, he refers to portions of the opinion of the Circuit Court of Appeals below as "twaddle" (p. 23); he speaks of Judge Patterson as having been "determined to accomplish his own purposes" (p. 25); he adverts to the question of "whether the administration of the receivership was corruptly and/or negligently in favor of the controlling bankers" (p. 26); he states that Judge Patterson "thumbed his nose at the law and the Mandate" (p. 29); he speaks of Judge Patterson's "ducking his duty" (p. 29), of his "stubborn bias in favor of the Interborough bankers' interests" (p. 29), of his "determination to nevertheless deprive me, and others who refused to be bullied, of our rights" (p. 30); and he asserts that the Circuit Court of Appeals "ducked" the issues which were before it (p. 31).

In fact, the content of his petition is made up in principal part of abuse of the courts, which undoubtedly grows out of his personal dissatisfaction with the results achieved,

but which has nothing to do with the legal and factual questions that were before the courts.

## I.

**The petition does not deal with the orders and decrees which were entered in connection with the Unification Plan, and therefore raises no issues on which certiorari can be granted.**

Salomon's petition does not discuss or analyze the question of whether the Unification Plan was fair, equitable or feasible, although the order of March 15, 1940, finding it to be fair, equitable and feasible is one of the three orders from which he appealed to the Circuit Court of Appeals. His petition does not discuss or analyze the Manhattan foreclosure sale or the order settling the reciprocal Interborough-Manhattan claims, both of which underlay the order on the fairness of the Plan. Indeed, he did not even appeal from either of those orders. His petition does not discuss or analyze any of the evidence on the values of the properties, or the amounts of the respective claims of the various classes of security holders. In short, his petition fails completely to deal with any of those problems which are fundamental to the orders and decrees which he seeks to have reviewed.

As we said at the outset, Salomon once again is concerned with the disaffirmance of the Manhattan lease. He has seized the opportunity of filing this petition in the hope of finding another forum in which to argue that matter. To show that the petition should be denied, we cannot improve upon the language of Judge Swan, who said (R., p. 962):

> "The contentions of appellant Salomon, a layman arguing his own case in a proceeding which

Judge Patterson characterized as the most complex he had ever encountered, are quite difficult to grasp. In so far as they can be understood we agree with respondents that they constitute in substance a re-argument of the disaffirmance issue, Salomon claiming, as a holder of Manhattan securities, that the rental obligations of Interborough to Manhattan should have been carried out to the letter. He further appears to contend that the *certiorari* proceedings in *Murray* v. *Roberts,* 103 F. 2d 889 on the disaffirmance question should have been prosecuted fully and that any compromise of the vexatious questions involved was improper. As we have indicated in the treatment of the appeal of Manheim, we conclude that the Settlement Proceedings resolving the conflicting claims of Manhattan and Interborough were properly instituted and concluded and should not be set aside; and certainly we shall not, in any event, decide the merits of such claims as this appellant appears to desire. These issues have wisely been set at rest."

## II.

**The petition should be denied.**

Dated, New York, N. Y., January 12, 1942.

Respectfully submitted,

WILLIAM C. CHANLER,
Corporation Counsel,
Attorney for The City of New York.

WILLIAM S. GAUD, JR.,
*Of Counsel.*

CHESTER W. CUTHELL,
Special Counsel to the Transit Commission.

ROBERT W. MALONEY, JR.,
*Of Counsel.*

BOYKIN C. WRIGHT,
Solicitor for Van S. Merle-Smith and others as a Protective Committee for Manhattan Railway Company Consolidated Mortgage 4% Gold Bonds.

CLIFTON MURPHY,
DANIEL JAMES,
*Of Counsel.*

The undersigned hereby join in the foregoing brief:

EDWIN S. S. SUNDERLAND,
Solicitor for J. P. Morgan and others as a Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds, and Guaranty Trust Company of New York, as Trustee.

CHESTER F. LEONARD,
*Of Counsel.*

PHILIP A. CARROLL,
Solicitor for J. Herbert Case and others as a Committee for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes.

GUY CARY,
CLIFFORD M. BOWDEN,
*Of Counsel.*

CARL M. OWEN,
Solicitor for Thomas E. Murray as Receiver of Interborough Rapid Transit Company.

ALLEN S. HUBBARD,
Solicitor for William Roberts as Receiver of Manhattan Railway Company.

HAROLD C. MCCOLLOM,
Solicitor for Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage of Manhattan Railway Company.

ORRIN G. JUDD,

JESSE E. WAID,
Solicitor for Bankers Trust Company, as Trustee under Collateral Indenture Securing Ten-Year Secured Convertible 7% Gold Notes of Interborough Rapid Transit Company.

CHAUNCEY BELKNAP,
Solicitor for Curtis, Belknap & Webb, as Attorneys-in-Fact for certain holders of Second Mortgage Bonds of Manhattan Railway Company.

CHARLES FRANKLIN,
Solicitor for Manhattan Railway Company.

RAYFORD W. ALLEY,
Solicitor for William S. Kies and others as the Independent Protective Committee for Manhattan Railway Company Consolidated Mortgage 4% Bonds.

JOHN S. CHAPMAN, JR.,
Solicitor for Theodore S. Watson and others, as a Protective Committee for Guaranteed 7% Stock of Manhattan Railway Company.

C. FRANK REAVIS,
Solicitor for Charles Franklin and others as a Committee for holders of Modified Stock of Manhattan Railway Company.

LOUIS BOEHM,
Solicitor for Norman Johnson and others, as a Committee for Ten-Year Secured Convertible 7% Gold Notes of Interborough Rapid Transit Company.

JOHN B. DOYLE,
Solicitor for Harold Palmer and others as a Committee for holders of 7% Guaranteed Stock of Manhattan Railway Company.

(11d)

Office - Supreme Court, U. S.
FILED
JAN 15 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941—No. 811.

SOLOMON G. SALOMON,

*Petitioner,*

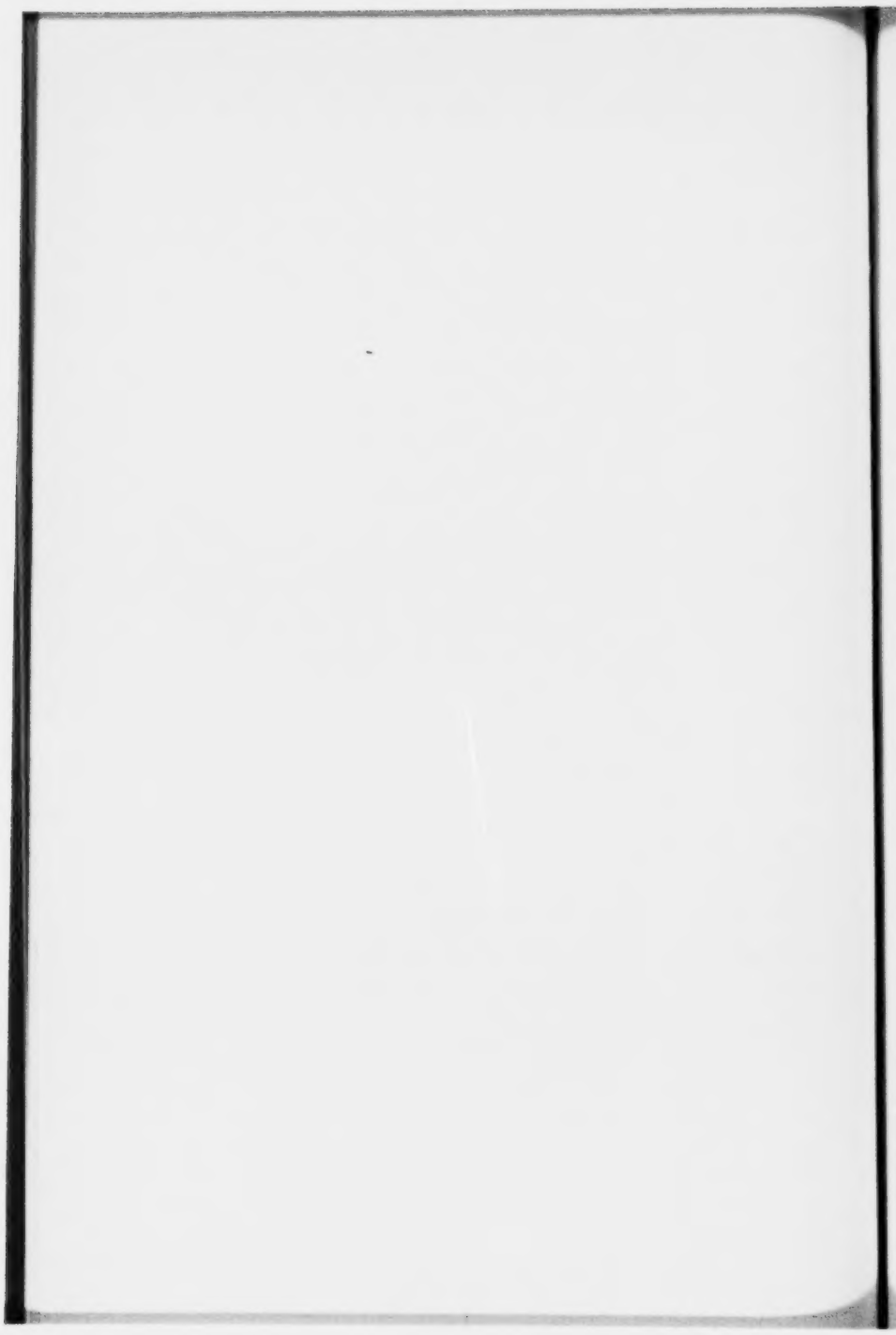
*against*

VAN S. MERLE-SMITH, *et al.*, J. P. MORGAN, *et al.*, and J. HERBERT CASE, *et al.*, Contracting Committees, THE CITY OF NEW YORK, the TRANSIT COMMISSION and all other parties to Plan and Agreement to end the receivership of Interborough and Manhattan Companies, THOMAS E. MURRAY as Interborough Receiver and WILLIAM ROBERTS, Receiver of Manhattan Railway Company,

*Respondents.*

## Memorandum, Pointing Out Misstatements Contained in the Briefs of the Respondents, Wherein Said Respondents Oppose the Respective Petitions of Paul E. Manheim and Solomon G. Salomon for Writ of Certiorari—October Term, 1941—Nos. 806 and 811.

SOLOMON G. SALOMON, *pro se,*
18 Pine Street,
Woodmere, N. Y.



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941.

No. 811.

SOLOMON G. SALOMON,
*Petitioner,*
*against*

VAN S. MERLE-SMITH, *et al.*, J. P. MORGAN, *et al.*, and J. HERBERT CASE, *et al.*, Contracting Committees, THE CITY OF NEW YORK, the TRANSIT COMMISSION and all other parties to Plan and Agreement to end the receivership of Interborough and Manhattan Companies, THOMAS E. MURRAY as Interborough Receiver and WILLIAM ROBERTS, Receiver of Manhattan Railway Company,
*Respondents.*

## Memorandum, Pointing Out Misstatements Contained in the Briefs of the Respondents, Wherein Said Respondents Oppose the Respective Petitions of Paul E. Manheim and Solomon G. Salomon for Writ of Certiorari—October Term, 1941—Nos. 806 and 811.

### Preliminary Statement

The Respondents, parties to the briefs in opposition to the petitions of Paul E. Manheim and Solomon G. Salomon, —October Term, 1941, Nos. 806 and 811,—have made such serious misstatements in said briefs that it behooves petitioner Salomon to call this Court's attention to the misstatements, in order to avoid the possibility of the misstatements being overlooked by this Court because of the press of matters calling for the Court's consideration.

**Misstatements in Brief Opposing Manheim's Petition**

1. The footnote on page 8 of the brief opposing Manheim's petition, averring **"the relevant portions"** of Section VII of the Public Service Law are set forth in the appendix to said brief, is not true.

Two relevant portions of subdivision 2 of §123 and all of relevant subdivision 10 of §124 of said Section VII were omitted by the Respondents. Exhibit A, annexed to this memorandum, sets forth all the relevant portions of said subdivision 2 of §123 and all of said subdivision 10 of §124.

The provision in subdivision 2 of §123 providing **the right** of Salomon, as holder of Manhattan Guaranteed 7% Stock, to appraisal of the value of his stock, is of course relevant to the question of whether the Plan was feasible as a matter of law.

2. The averments on pages 9, 10 and the first three lines of page 11 of said brief constitute a half-truth. Actually the Interborough-Manhattan Unification Plan was entered into under subdivision 12 of §124 of Section VII of the Public Service Law which did not become effective until May 19, 1939. This addition to said law was added by the state law, 1939, Chapter 477.

3. The statement on page 13 of said brief that only 27.55% of Manhattan Guaranteed 7% Stock and 63.27% of the Manhattan Modified Guarantee Stock had been deposited on November 22, 1939 is untrue.

On that day 400,675 shares of Manhattan Stock had been deposited and the City became the owner of more than two-thirds of all Manhattn shares of stock on November 22, 1939 as provided in the Plan and evidenced by the Resolutions of the Transit Commission set forth in Volume I, pages 385-87 of the Record on Appeal.

Being a non-assenting holder of Manhattan Guaranteed 7% Stock, Salomon had and has the right to appraisal provided in Article VII, §123, subdivision 2 of the Public Service Law, and Salomon contends the denial thereof in the Plan is not feasible as a matter of law.

**Misstatements in Brief Opposing Salomon's Petition**

1. The last paragraph on page 2 of the brief in opposition to Salomon's petition is untrue in so far as it infers Salomon would have petitioned this Court for writ of certiorari without revealing to the Court "Whether he had sold any further securities" than those set forth in his Reply Brief below.

Salomon has not sold any other of his securities and the Respondents could have informed themselves by asking Salomon.

2. The statement in the last paragraph on page 4 of the brief opposing Salomon's petition, that Salomon **"would make illegal any Unification Plan that was adopted"**, is untrue.

Salomon is not so foolish as to contend that the City could not have legally acquired title to Manhattan Properties after having acquired over two-thirds of Manhattan's shares of capital stock, by the method provided in subdivision 2, §123 of Article VII of the Public Service Law.

Salomon does contend that the City could not legally, or justly, acquire title to any Manhattan property via the method provided in Article Two (2) of the Plan, and he contends that the latter method violates the provisions of the Constitution of the United States which provide against the taking of anyone's property without due process of law and without just compensation.

3. It is not true that Salomon's language in his petition for writ of certiorari is intemperate, as stated on page 5 of the brief in opposition to said petition. Neither is it true that he lacked restraint in using the words and expressions quoted on said page 5.

Salomon used concise language on pages 17 to 26 of his petition to succinctly state the matters to be considered in connection with his petition, and to so state the specification of errors to be urged in the event his petition is granted.

The question is whether Salomon's statements clearly state **the matters to be considered** and **the specifications of**

**errors to be urged by him;** and Salomon submits it is not intemperate to call a spade a spade, and that he was not called upon to restrain himself in clearly stating the **reasons for granting the writ.**

4. Under the heading **"I"** Respondents allege:

> "Salomon's petition does not discuss or analyze the question of whether the Unification Plan was fair, equitable and feasible, although the order of March 15, 1940, finding it to be fair, equitable and feasible is one of the three orders from which he appealed to the Circuit Court of Appeals."

but Judge Patterson's order of March 15, 1940 did not find the Plan feasible. The Record (Vol. I, p. 419) shows he then thought the Plan timely.

There is a vast difference, as a matter of law, between a timely and a feasible plan.

The Record on Appeal (Vol. II, pp. 879-87) shows that Mr. Gutman analyzed the Plan as premature and since same also shows Salomon adopted said analysis, it is not true that Salomon did not, in effect, analyze the said order of March 15, 1940 in advance of the issuance thereof. In fact the foresaid is set forth under **B** on page 5 of Salomon's petition.

Respondents, under said heading **"I"**, allege Salomon's

> "petition does not discuss or analyze the Manhattan foreclosure sale"

which is not true. Salomon's petition to the Circuit Court of Appeals for rehearing is incorporated in his petition to this Court for writ of certiorari and shows he did raise the issue of the fairness of the foreclosure in the Court below.

Salomon's **specifications of errors to be urged** numbered 1, 3, 4 and 5 also belie the said allegation. Salomon's statement of **the matters to be considered in connection with this (his) petition** numbered 1st, 8th, 9th, 10th, 12th, 16th and 18th also belie said allegation.

Respondents, under said heading **"I"**, allege Salomon's petition does not discuss or analyze

> "the order settling the reciprocal Interborough-Manhattan claims"

and this also is not true. Salomon's petition to the Circuit Court of Appeals for rehearing (petition for writ of certiorari, p. 14, next to last line, to p. 15, line 9, and p. 15, lines 23 to 28) shows he raised the issue that the order settling the reciprocal claims was unfair. Salomon's statement of **the matters to be considered in connection with this (his) petition** numbered 6th, 7th and 16th belie said allegation and by the contention that among the **reasons for granting the writ is**

> "The rationale of said holding confirmed the contention (allegation 9) in Manhattan Receiver's Application No. 5, March 31, 1933, alleging Manhattan and the holders of its guaranteed 7% stock were and are operating creditors of the Interborough System" (Salomon's petition for writ, p. 30, lines 2 to 6).

WHEREFORE, Salomon submits, Respondents' briefs in opposition to the grant of writ of certiorari are disingenuous.

Respectfully submitted,

SOLOMON G. SALOMON, *pro se,*
18 Pine Street,
Woodmere, N. Y.

## EXHIBIT A

### Article VII, New York Public Service Law

§ 123. *Commission to prepare plan*

* * *

2. * * * Without limiting the authority and discretion of the commission, it may consider the incorporation in the plan of provisions whereby the title to such railroads as are not already owned by the city and whose ownership thereby is deemed by the commission to be desirable may be vested in the city and whereby rights under existing contracts for the construction, equipment and operation of rapid transit railroads already owned by the city may be acquired by the city. Such title and/or such rights may be vested in the city directly or may first pass through an intervening corporation and then to the city, either free and clear of liens and encumbrances or subject to specified liens and encumbrances, in return for a lease or leases by the city of such railroads and of any other railroads owned by it and such other or additional considerations as the commission may determine with the approval of the local authority. In the event of the incorporation of such provisions in the plan the commission shall outline an arrangement whereby outstanding securities of the railroad companies may be retired either by application of the amounts paid by the city for the railroads acquired or through the issue of bonds of the board, or in part by one method and in part by the other, and whereby such bonds or other securities may be amortized or otherwise paid. Any railroad company included in the plan may, with the consent of the holders of record of at least two-thirds of its outstanding shares of stock entitled to vote thereon given as provided in section one hundred and forty-eight of the railroad law, transfer and convey its property, appurtenances and franchises, or any part thereof, to the city and/or such intervening corporation as provided in the plan, subject, however, to the rights of appraisal of

the shares of any dissenting stockholder as provided in section one hundred and sixty-one of the railroad law.

* * *

§ 124. *Procedure under plan*

* * *

10. Recaptured railroads. All the provisions of this article and all powers hereby granted with reference to railroads and properties and interests therein shall likewise apply with equal force and effect to recaptured railroads; provided, however, that nothing contained in this article with respect to recapture or recaptured railroads shall alter or affect any rights or remedies of the city or of any railroad company under any existing contract.

(11e)

# Supreme Court of the United States

October Term 1941—No. 811

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Plaintiff,

—against—

INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee,
Plaintiff,

—against—

MANHATTAN RAILWAY COMPANY, et al.,
Defendants.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, et al.,
Plaintiffs,

—against—

INTERBOROUGH RAPID TRANSIT COMPANY, et al.,
Defendants.

SOLOMON G. SALOMON, for himself,
Appellant,

—against—

VAN S. MERLE-SMITH, et al., J. P. MORGAN, et al. and J. HERBERT CASE, et al., Contracting Committees, THE CITY OF NEW YORK, the TRANSIT COMMISSION and all other parties to Plan and Agreement to end the receivership of Interborough and Manhattan Companies, THOMAS E. MURRAY, as Interborough Receiver, and WILLIAM ROBERTS, Receiver of Manhattan Railway Company,
Appellees.

***PETITION ASKING RECONSIDERATION OF PETITIONER'S PETITION, OF OCTOBER TERM, 1941—NO. 811, DENIED FEBRUARY 2, 1942.***

SOLOMON G. SALOMON, pro se,
18 Pine Street, Woodmere, N. Y.

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> "Does anybody in his senses think that every Manhattan bond and that every Manhattan share of stock is going to be paid in full before the money that was put in to build the subways and buy equipment?" (R. p. 881—lines 25 to 28).

Judge Swan's opinion, (R. pp. 951-962), in effect, admits Judge L. Hand, Judge Swan (himself) and Judge Chase were "not in their senses", on April 17, 1939, although no formal decree was entered by Patterson in respect to the question of sanity. The C. C. A. failed to perform its duty when it allowed Patterson to reverse the C. C. A., in effect, by approving the Plan and ordering consummation thereof. Petition No. 811 should be granted by this Court to pass upon the authority of the C. C. A. to allow itself to be reversed by a judge acting in the capacity of a district judge ..... 14

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# Supreme Court of the United States

October Term 1941—No. .....

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Plaintiff.

—against—

INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee,
Plaintiff.

—against—

MANHATTAN RAILWAY COMPANY, et al.,
Defendants.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, et al.,
Plaintiffs.

—against—

INTERBOROUGH RAPID TRANSIT COMPANY, et al.,
Defendants.

SOLOMON G. SALOMON, for himself,
Appellant.

—against—

VAN S. MERLE-SMITH, et al., J. P. MORGAN, et al. and J. HERBERT CASE, et al., Contracting Committees, THE CITY OF NEW YORK, the TRANSIT COMMISSION and all other parties to Plan and Agreement to end the receivership of Interborough and Manhattan Companies, THOMAS E. MURRAY, as Interborough Receiver, and WILLIAM ROBERTS, Receiver of Manhattan Railway Company,
Appellees.

## *PETITION ASKING RECONSIDERATION OF PETITIONER'S PETITION, OF OCTOBER TERM, 1941—NO. 811, DENIED FEBRUARY 2, 1942.*

*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

I respectfully petition and ask you to reconsider your decision, February 2, 1942, not to grant my petition

bearing Docket Number 811 of The Current Term of this Court (hereinafter called Petition No. 811).

***Statement***

On page 17 of Petition No. 811, I said the petition was:

> "the result of the Circuit Court's action of having ignored and failed to consider the matters involved in my appeal to them."

The matters involved in my appeal to the Circuit Court, (hereinafter called C. C. A.), were set forth, in accordance with the Court's rules, in my main brief filed in said court. Therefore, said court should have considered and decided each matter involved therein on its merits, and not upon the merits of the restricted appeal of another appellant. My "day in court", I maintain, is not limited to being heard only in the physical sense.

The matter of violation of my rights under the Federal Constitution, by the Federal District Court and its receivers as well as in the Plan, was presented by me as the first reason for finding the Plan and Agreement therein, not feasible as a matter of law, and therefore, not to be deemed fair and equitable. It was presented in these words:

> 'FIRST: They constitute, in effect a scheme which is unfair as a matter of law because it operates to take from Manhattan Company and through it, from Appellant and others similarly situated, that which belongs to them, without due process of law and to deprive Manhattan Company, Appellant and others similarly situated, of their belongings, without just compensation." (p. 8, my Main Brief to C. C. A.).

The City and other respondents claimed the Plan was

authorized by Section 124 of the Public Service Law of the State of New York, (p. 17, Respondents' Brief below and printed in Appendix of same). Respondents referred to subdivision 12 of said Section 124 on page 23 of their brief when they said:

> "* * * the City obtained title to these properties through a series of stated offers to the several classes of Interborough and Manhattan security holders * * *."

I contended, (pp. 7-8 and 13-14 of my Reply Brief), that said section and its context, Section 123, endows me with the right of appraisal of my stock by a prescribed method —due process of law—and the Plan operates to deprive me of said right which is, of course, property. My contentions were expressed in these words:

> "Item 9 is disposed of by referring to Article VII, New York Public Service Law, Section 123, paragraph 2 and noting that on page ii of the Appendix to the answering brief there has been omitted from paragraph 2 the following important provision thereof:—
>
> 'Any railroad company included in the plan may, with the consent of the holders of record of at least two-thirds of its outstanding shares of stock entitled to vote thereon given as provided in section 148 of the railroad law transfer its property * * * or any part thereof to the City * * * subject, however, to the *right of appraisal of the shares of any dissenting stockholder** as provided in section 161 of the railroad law.' (pp. 7-8, *supra*). *Italics in original.
>
> "POINT 3
>
> As set forth in POINT 2, the plan could not

properly be consummated by a foreclosure of the Manhattan Consolidated Mortgage even though the foreclosure of the Interborough Mortgage could not be refused.

It follows from the foresaid that the only lawful method which the City could employ to consummate the Plan in respect to Manhattan was by a purchase of the securities under Article Eight, Section VII of the Plan. Since it is inherent in the Plan that it be consummated either through foreclosure of both properties or purchase of Interborough's bonds and 7% notes (the City was not obliged to buy other Interborough securities), the City must be deemed to have purchased the Interborough securities as well as the Manhattan securities.

POINT 4

Under the Unification Act and that part of Section 123 thereof omitted by Respondents in printing the Appendix to their brief, the City was under the necessity of proceeding to a real evaluation of my Guaranteed stock and the Court was under the duty of exacting that the rentals due me and impounded by it, be paid to me in addition to the said value of my stock.

POINT 5

The City on and after November 22, 1939 was to all practical effect in the position of a holding company dissolving two subsidiaries, one solvent and the other insolvent.

Under the principles enunciated by the Supreme Court in *DuBois* v. *Consolidated Rock Products Co.*,* the solvent Manhattan Company may not be dissolved without protecting the minorities' security holders who are not content with the City's

> self-serving plan to dissolve the two subsidiaries under the Plan which was carried out for it, by the representatives of the former holder of the majorities of the securities. (pp. 13-14, *supra*)."
> *Italics in original.

These are among the contentions which the C. C. A. characterized as "quite difficult to grasp", (R. p. 962), and in continuation, referring to my contentions, said:

> "In so far as they can be understood we agree with respondents that they constitute in substance a reargument of the disaffirmance issue, * * *."

Is it not apparent that the C. C. A. wished to avoid true consideration and decision of the matters involved in my appeal, on their merits?

Are not these things also apparent?

> 1. That the Plan was and is unauthorized by law, by the terms of the Public Service Law, because my and other non-assenters' rights to have our stock appraised by the method defined in Section 123, subdivision 2, (*supra*), was not provided in the Plan, except if there be a binding adjudication that the Public Service Law, by reason of context or obscurity, needs interpretation, and the required interpretation is supplied in the adjudication and shows the Plan to be lawful.
>
> 2. (a) That the Plan is not an adjudication that the holders of Interborough bonds had or have priority rights over Manhattan Company to more than $70,000,000 of assets of Interborough, distributed to holders of the bonds up to February, 1939; and that under the existing law of the receivership—*Murray* v. *Roberts* (103 F. 2d. 889), as fortified by the Rapid Transit Act law of New York, Section 24, subdivision 3—the Manhattan

Company is entitled to priority over the Interborough bondholders; and

(b) Therefore, the District Court was and is bound, by the terms of its orders, (authorizing distributions of said $70,000,000), to recover the amounts distributed under the orders and redistribute same to the Manhattan Company, the holders of its securities, and the Interborough bondholders, according to the established sequence of priorities; and therefore, absent such distribution, the receivership was and is not validly terminated.

3. That the decision of the Circuit Court of Appeals for the Second Circuit is in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in the *Consolidated Rock Products Co.* case, (114 F. 2d. 102), and in conflict with this Court's decision in the same case, (85 L. ed. 603), in the manner set forth in "POINT 5" of my Reply Brief, (*supra*).

Another thing is, of course, apparent. The C. C. A. in its statement of the case showed ownership, by me, of $47,000 Manhattan Consolidated Mortgage bonds, $11,000 Manhattan Second Mortgage bonds, (hereinafter respectively called 1st and 2nd Mortgage), and 560 shares of Guaranteed 7% stock. Consequently, am I not entitled to a decision on the merits of my appeal or appeals in respect to each?

Should these not be decided, categorically? I maintain there should be:

1. A decision of the matters involved in my appeal in respect to the 1st Mortgage bonds of which some $77,000, apparently, were outstanding May 1, 1941 (R. p. 954).

2. An independent decision of the matters involved in my unrestricted appeal in respect to my $11,000 2nd Mortgage bonds, of which 521,000,

apparently, were outstanding May 1, 1941, (R. p. 954), for the reason that Manheim's appeal on behalf of $484,000 of said bonds, was restricted and did not contest the validity of the transfer of Manhattan properties to the City via foreclosure, (R. p. 955), which I did and do contest on my own behalf and that of the owners of the other bonds not accounted for.

3. A decision of the matters involved in my appeal in respect to my Guaranteed 7% stock, of which some 1630 shares, apparently, were outstanding May 1, 1941, (R. p. 954).

## POINT I.

**1. The settled doctrine of this Court is, that if a plan is not feasible as a matter of law it cannot be validly approved by any Court. The rationale of the doctrine is the following: Since an executed plan, (whether of reorganization or liquidation), is an act of administration performed by the judge in charge of the receivership, therefore, the judge may not approve any plan submitted to him except it conforms to law; otherwise, the judge will have committed himself to break the law. It is a matter of fundamental public concern that judges shall not break the laws they are charged with enforcing.**

This Court said, November 6, 1939:

> "We think that as a matter of law the plan was not fair and equitable.
>
> At the outset it should be stated that where a plan is not fair and equitable as a matter of law it cannot be approved by the court * * *. All those interested in the estate are entitled to the court's protection. * * * 'Every important deter-

> mination by the court in receivership proceedings calls for an informed, independent judgment.' National Surety Co. v. Coriell, 289 U. S. 426, 436, 77 L. ed. 1300, 1305, * * *" Case v. Los Angeles Lumber Products Co. (84 L. ed., 22, 28-9).

In connection with the matter of an "informed, independent judgment", this Court, on March 3, 1941, again citing *National Surety Co.* v. *Coriell*, said:

> "In the first place, there must be a determination of what assets are subject to the payment of the respective claims. This obvious requirement was not met. The status of the Union and Consumers bondholders emphasizes its necessity and importance." Consolidated Rock Products Co. v. Du Bois (85 L. ed. 603, 609.)

Here it was and is necessary to determine the status of the Manhattan bondholders and the Interborough bondholders in their relationship to one another. This determination, obviously, depends upon determination of whether Manhattan Company is an operating creditor of the Interborough Company and its receivers. As an operating creditor of the Interborough system, the rentals payable to Manhattan Company by the terms of the lease, (Article Ninth), include the obligation or value of supplying:

> "* * * rolling stock and equipment, so that the business of the said demised railways shall be preserved, encouraged and developed, * * *."

Your Honors are undoubtedly aware that such rolling stock and equipment was not supplied. The rentals also include the making good of the accrued depreciation incurred by the use of the rented property.

Therefore, a determination of whether Manhattan

Company and the holders of its securities are operating creditors of the Interborough System and its receivers must necessarily be had.

**The decision and mandate in Murray v. Roberts and the order of Judge Patterson, adopting same, constitute affirmance of the lease.**

The decision in *Murray* v. *Roberts* is interpreted by Judge Swan, in his opinion of August 12, 1941, in the following words:

> "* * * on April 17, 1939 an opinion was handed down holding that because of certain franchise obligations to the City the lease could not be disaffirmed unless, * * * these obligations could be performed by some means other than affirmance * * *." (R. p. 953).

Since there was no right to disaffirm the lease, and since no "means other than affirmance" thereof became available to June 12, 1940, the question arises: Under what legal right (means) did the Interborough receivers operate the Manhattan lines from August 26, 1932 to June, 1940?

The answer to the question, I submit, appears in the Judicial Code, Section 65, (28 U. S. C. A., Sec. 124), which provides:

> "Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof * * *."

Interborough, being required to operate its system under

its franchises, including the Manhattan lease, the leases from the City and the Extension Certificate, such operation was required of the Interborough receivers. Ergo, they necessarily adopted the lease on August 26, 1932. Therefore, Manhattan rentals must be paid either by recovering the interim debt service payments to Interborough bondholders, or by some other means, before there can be a valid termination of the receivership of the Interborough and the protective custody of the Court over the Manhattan Railway.

If the C. C. A. had not looked upon my contentions with contempt, (see opening sentence, last paragraph of its opinion, [R. 962]), they would have read and understood the first sentence of my Main Brief below, which reads:

> "This appeal is from the declaration filed on March 15, 1940, by the District Court, * * * wherein the court, * * * declared the Plan and Agreement hereinafter briefly outlined and described, to be a fair, equitable and feasible scheme for ending the Equity Receivership of the Interborough Transit Company, *which included protective receivership of the Manhattan Railway* Company; and from said Court's orders connected therewith, filed June 12, 1940. The Court, by said orders, (a), * * *; (b), * * *; and (c), * * *. *Said orders, unless corrected, would serve to rid the Court of its unfulfilled duties including the duty of settling and determining the impropriety of interim payment totalling over $70,000,000.*"*
>
> *Not Italicized in original.

The aforegoing shows I contended the receivership could not be *validly* terminated without a decree being issued, declaring the distributions to Interborough bondholders during the receivership, (before the remainder of the properties were turned over to the City), were not according to the priorities of the creditors, and with-

out an order being issued ordering correction of the mal-distributions through their recovery and proper re-distribution. In the event some more convenient method of correcting the mal-distributions had been available, then that should have been employed.

My Description and Outline of the Agreement, (Main Brief below, pp. 3-7), is, I submit, accurate. It specifically drew attention, (p. 5), to the fact that an alternate method, alternate to ARTICLE Two of the Plan, for consummating the Plan, had been provided therein, in ARTICLE EIGHT, Section VII. Having chosen to acquire securities, it follows that under the Public Service Law, Section 124, subdivision 12, the method provided in ARTICLE Two, (acquisition of title via foreclosure and receivership sale), was evidently precluded by the terms of the Plan itself, as well as by the context of Section 124 of the Public Service Law, provided in Section 123 thereof, *supra*.

**What would be the status of the receivership if Judge Patterson's order adopting the decision and mandate in Murray v. Roberts does not, in effect, constitute affirmance of the lease?**

Presuming there had not been a determination that the receivers had no right to disaffirm the lease, (see Judge Swan's interpretation of *Murray* v. *Roberts*, *supra*), and therefore, were not compelled by law, (Judicial Code, *supra*, and the Rapid Transit Act, Section 24, subdivision 3), to adopt the lease, and presuming I was seeking to re-argue the case of *Murray* v. *Roberts*, (none of which things I admit), there would still have to be a determination as to the matter of disaffirmance of the lease, to establish whether or not the rentals constituted operating expenses of the system. Roberts, in his Application No. 5, March 31, 1933 and ever after, claimed Manhattan rentals were operating expenses. Determination of that matter is necessary for the purposes of the

receivership, set forth in the American Brake Shoe Co.'s Bill of Complaint.

Obviously, *absent such determination, there can be no informed judgment of whether the protective custody of Manhattan could be validly terminated*, and hence, the Interborough receivership, validly terminated.

**Judges, (both of original and appellate jurisdiction), may not neglectfully or otherwise ignore the law.**

Obviously, it is a matter of fundamental public concern that judges shall not break the law they are charged with enforcing by neglect or by otherwise ignoring it.

The law of the land is that the rights of creditors of an insolvent defendant, (in this case, the Interborough), be ascertained and decreed; that the Court fully administer the fund constituting the entire railroad system and other assets of the defendant; and, for such purpose, marshal and administer all the assets of the defendant, ascertain the several and respective liens and priorities existing thereon, and enforce by decree the rights, liens and equities of the creditors of the defendant, as the same may be finally ascertained and decreed by the Court.

Such was the prayer in the Bill of Complaint under which this cause was initiated. Certainly, this receivership could not be lawfully dissolved by the court of original jurisdiction without having ascertained the respective liens and priorities and without having enforced them according to their lawful sequence.

Irrespective of the business complexities of the receivership, nothing stood in the way, at any time, of ascertaining whether Manhattan was an operating creditor of the Interborough system, by reason of Interborough's franchise and contract obligations in respect to its routes, under the Rapid Transit Act of the State of New York. Under said act, it operated its elevated railway routes

by virtue of Section 24, subdivision 3, as if they were original unitary routes; and it operated its subway routes under Section 27 thereof. Judge Patterson and the judges of the C. C. A. neglected or chose to ignore my often re-iterated insistence on Section 24 of the Rapid Transit Act.

Certainly, this receivership could not be lawfully dissolved by the Court without having ascertained the respective liens and priorities and without having enforced them according to their lawful sequence. Of course, the priority of an operating creditor over other Interborough creditors is not subject to doubt. It is evident that in the absence of such requisite determination, the judges of the C. C. A. and Judge Patterson neglected or ignored the necessity of enforcing the applicable law in the premises. *The matter was aggravated by the fact* that it was not proper to throw over or terminate the protective custody of Manhattan without the requisite fixing of its lawful priority as an operating creditor.

Therefore, I submit, it is fitting and proper, because of the fundamental public concern in the orderly enforcement of the law of the land, that this Honorable Court grant my Petition No. 811.

## POINT II.

**The C. C. A. had the question of sequence of priority of Interborough system's creditors before it in Murray v. Roberts. It decided Interborough bondholders had no right to payments on account of the debt owed them until all operating expenses involved in Interborough's obligation to operate the system had been fulfilled. Judge Patterson, at the hearings, in respect to the fairness of the Plan, said:**

> **"Does anybody in his senses think that every Manhattan bond and that every Manhattan share of stock is going to be paid in full before the money that was put in to build the subways and buy equipment?"** (R. p. 881—lines 25 to 28).

**Judge Swan's opinion,** (R. pp. 951-962), **in effect, admits Judge L. Hand, Judge Swan (himself) and Judge Chase were "not in their senses", on April 17, 1939, although no formal decree was entered by Patterson in respect to the question of sanity. The C. C. A. failed to perform its duty when it allowed Patterson to reverse the C. C. A., in effect, by approving the Plan and ordering consummation thereof. Petition No. 811 should be granted by this Court to pass upon the authority of the C. C. A. to allow itself to be reversed by a judge acting in the capacity of a district judge.**

Judge Patterson assumed the protective custody of Manhattan Railroad Company together with supervision of the Interborough receivership. His duty was to preserve for Manhattan and its security holders, the rank of operating creditors, in which they had been established by the decision of the C. C. A. on April 17, 1939, and by the ensuing mandate.

Pursuant to his own opinion, filed June 18, 1938, he ordered debt service payments on Interborough bonds and 7% notes on July 1, 1938 and in January, 1939, because he had adopted the opinion of the Interborough receivers, set forth, (March 14, 1933), in their Application No. 17, wherein they alleged the right existed to disaffirm the Manhattan lease, and because he had rejected the opinion of Receiver Roberts, (March 31, 1933), in his Application No. 5, that Manhattan rentals were and are operating expenses of the Interborough system.

Patterson's manager, Receiver Murray, was obliged to perform Interborough's franchise obligations in the same manner and by the same means Interborough would have been obliged to perform them, if in possession, (Judicial Code, Section 65, *supra*). Such was the decision of the C. C. A. on April 17, 1939 (*Murray* v. *Roberts, supra*).

In respect to the priorities, referring to *Union Trust Co.* v. *Curtis,* (182 Ind. 61), the C. C. A. said:

> "It is a doubtful authority against the view we take. Aside from it we have found no case excusing non-performance, unless indeed the road has come to such a pass that it cannot earn its expenses of operation. New York Trust Co. v. Portsmouth & Exeter St. Ry. Co., 192 Fed. Rep. 728; Jack v. Williams, 113 Fed. Rep. 823. We do not believe that even then the property may be withdrawn and the remnant salvaged, for reasons we shall give; but in any event that is not the situation at bar. Our reasons for this belief are these. Ordinarily the doctrine (which we shall discuss later) that failure to exploit a franchise will forfeit it, is sanction enough to insure performance; and in the case of 'permissive' franchises the grantee is subject to no further control. If he is willing to throw up the whole franchise, he is free to retire. When, however, a franchise is made 'mandatory,' it is because this sanction

> is not thought to be sufficient guarantee, and the grantee must be understood irrevocably to dedicate the property to the performance of the duty expressly assumed. This is not an unfair imposition. Franchises are not ordinarily exploited by individuals, but by corporations, whose activities are limited to the one venture for which they are created: their property may well be subjected to this fundamental obligation ahead of all others. The bondholders are in substance co-adventurers and chargeable with the initial conditions imposed upon the enterprise; and the same is true, though in somewhat less measure, of general creditors who deal with the corporation. The only answer made to this is that the covenant of Article IX has become impossible of performance, and unreasonable to enforce. Neither objection is good: the trains can be run, and the duty to run them, as we shall show, entails a duty to keep possession at least of the Manhattan third tracks, and the further duty as a condition of possession, though not strictly as an obligation, to exploit them sufficiently to avoid forfeiture." (*Murray v. Roberts, supra*).

Patterson, in his opinion of March 12, 1940, (R. pp. 400-409), admitted he was reversed as to the existence of any right to dissaffirm the lease, but by his remark on March 6, 1940:

> "Does anybody in his senses think that every Manhattan bond and that every Manhattan share of stock is going to be paid in full before the money that was put in to build the subways and buy equipment?" (R. p. 881, lines 25 to 28)

wiped out the above quoted part of the decision, (*Murray* v. *Roberts*), which decides the relative positions of the Manhattan rentals and the obligations to the Interborough bondholders. In the same breath, he abandoned

his trusteeship involved in the protective custody of the Manhattan and the interests of Manhattan security holders; and, thereupon, purportedly terminated the Interborough receivership, to the damage of Manhattan security holders who did not assent to the Plan.

The colloquy in which the above quoted remark occurred is a part of that set forth on pages 879 to 887 of the Record on Appeal to the C. C. A.

The opinion of the C. C. A. (R. pp. 951-62), in effect, impugns its opinion in *Murray* v. *Roberts* as to the sanity of those judges, in relation to their ideas as to the relative position of the Manhattan rentals and the obligations to the Interborough bondholders. Although no formal decree was entered by Patterson in respect thereto, and therefore the question was not before the C. C. A., (in the appeal decided by it on August 12, 1941), the C. C. A., in effect, allowed Judge Patterson to reverse the C. C. A. as to the said relative position of rentals and bond service.

Obviously, the C. C. A. did not perform its duty, in allowing said reversal of itself by a lower Court to stand in a decision in which it determined not to consider the merits of my claims, which include the claim for some $56 per share rental to July 1, 1940 in respect to my Manhattan Guaranteed stock, and said:

> "* * * certainly we shall not, in any event decide the merits of such claim as this appellant appears to desire." (R. p. 962).

The C. C. A. refused to decide the merits of my claim that the receivership could not be terminated lawfully, until the unpaid rentals due under the Manhattan lease had been paid by the receivers to Manhattan Company and to me, according to the terms of the lease. I claimed the receiver had no right to disaffirm the lease and that he operated thereunder throughout the receivership; same being his only means to perform his franchise obligations

to operate the Interborough elevated railroad routes. The C. C. A. had decided the lease was his only existing means to perform said obligation. (*Murray* v. *Roberts*, *supra*).

I also claimed $56 per share rental were due to me to July 1, 1940 on my 560 shares of Manhattan Guaranteed stock and had been wrongfully diverted and paid to holders of Interborough bonds and 7% notes, who were not operating creditors; whereas, my status is that of operating creditor. I claimed that the Plan to terminate the protective custody of the Manhattan Company's and of my interests, was not fair, because the Plan arbitrarily provides that my interests in and to the physical and contractual assets of my company, and said rental claim for $56 per share, would be settled by allocating $27.62 cash or $35 minus, in City corporate stock, per share, in settlement of all my claims in respect to my stock; and, I claimed the Interborough receivership could not be terminated validly under such circumstances.

Since I am entitled to a determination in respect to my rights established by the C. C. A. in *Murray* v. *Roberts*, I submit it is fitting and proper that Petition No. 811 be granted, by this Honorable Court.

## *CONCLUSION.*

This Court is aware ~~of~~ the Interborough Receivership and also the Protective Custody of Manhattan Company's and Security-holders' interests were commenced by, and under the supervision of, a corrupt judge, Martin T. Manton. At the trial of Manton, (the present Chief Justice of this Court was sitting), a stipulation was entered that Thomas E. Murray had purchased 225 shares of stock in a corporation controlled by Manton and his wife, (Murray paying in two installments, the last in July), just previous to his appointment as receiver. Said stock actually had little or no value at the time of purchase, and the proceeds of the sale

were used to pay Manton obligations. On the same day, August 26, 1932, Manton appointed Murray, he appointed Chadbourne, Stanchfield and Levy counsel for the receivers and he nominated Victor J. Dowling to be co-receiver with Murray, although Dowling was then a partner in said law firm.

The New York World-Telegram of Sept. 7, 1932 quoted an interview with Dowling, who returned from Europe that day. Dowling stated he felt he would have to withdraw from the firm of Chadbourne, Stanchfield and Levy in order to quality as receiver. He made an affidavit on September 23, 1932 which was filed September 27, 1932 that he had resigned. He thereby qualified before Manton. The public furore in respect to the manner Manton appointed himself, emphasized the necessity of Chadbourne's resignation as counsel for the receivers. Manton of his own motion appointed the counsel who thereafter served the Interborough Receivers.

The Receivership, from the beginning, was no more than a determined effort to disaffirm the Manhattan lease. The effort was defeated by Judge L. Hand's opinion in *Murray* v. *Roberts*, deciding no right existed to disaffirm the lease.

The negotiations of the Plan and its terms, were devised by the three parties called "Contracting Committees" in the Plan, after April 17, 1939, the day the decision written by Judge L. Hand was filed.

The Plan to dissolve the receivership operates to defeat my company's and my rights to priority over Interborough bondholders, contrary to the terms of the "Mandate" in *Murray* v. *Roberts*, justice, the laws of the United States and of the State of New York.

***Wherefore, I submit, Petition No. 811 should be granted on reconsideration of the denial thereof on February 2, 1942.***

Respectfully submitted,

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(3377)

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